Supreme Court, U.S.
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No. 1583

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

VEB CARL ZEISS JENA, *et al.*,
Petitioners,

—v.—

CARL ZEISS STIFTUNG, *et ano,*
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENT TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION

WILLIAM ELDRED JACKSON
ISAAC SHAPIRO
1 Chase Manhattan Plaza
New York, N. Y. 10005
Attorneys for Respondents

Of Counsel:

MILBANK, TWEED, HADLEY & MCCLOY
1 Chase Manhattan Plaza
New York, N. Y. 10005

WALTER J. DERENBERG, ESQ.
VON MALTITZ, DERENBERG,
KUNIN & JANSSEN
60 East 42nd Street
New York, N. Y. 10017

May 1971

INDEX

PAGE

Findings of Fact S-1

Findings of Fact with Respect to Antitrust Misuse Defense S-127

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

62 Civ 850

(Filed November 7, 1968)

CARL ZEISS STIFTUNG, doing business under the name and style of CARL ZEISS; and ZEISS IKON A.G.,

Plaintiffs,

—against—

V.E.B. CARL ZEISS, JENA; STEELMASTERS, INC.; ERCONA CORPORATION; EXAKTA CAMERA COMPANY, INC.; and CAMERA SPECIALTY COMPANY, INC.,

Defendants,

CARL ZEISS, INC.,

Additional Defendant on Counterclaims.

Findings of Fact

The following Findings of Fact made by the Court supplement those in its opinion of this date:

1. In 1846 a man named Carl Zeiss established a workshop for the manufacture of optical and mechanical instruments and related products in the City of Jena, in the Grand Duchy of Saxe-Weimar-Eisenach, Empire of Germany.

2. On April 16, 1863, the enterprise was registered in the Commercial Register for the City of Jena under the

firm name "Carl Zeiss", with Carl Zeiss as its owner. (The enterprise is hereinafter referred to as the "Zeiss firm" or the "Zeiss enterprise.")

3. Under Section 17 of the German Commercial Code a "firma" (firm) is the name under which a merchant (who can be either a natural person or a legal entity) carries on a business and may sue and be sued. It is also used to describe an enterprise with its own management, assets and financial books and records. It is not, however, a legal entity or personality capable of having a domicile or owning property or other rights; it is the proprietor of the enterprise who has the domicile and who owns the property.

4. In 1875 Ernst Abbe, a Professor at the University of Jena, who was vitally interested in the development of optical science, joined the Zeiss firm as a limited partner.

5. On October 11, 1879, Roderich Zeiss, the son of Carl Zeiss, became a partner in the Zeiss firm.

6. Carl Zeiss died in 1888 and his interest in the Zeiss firm passed to his son Roderich. On April 18, 1889, Professor Abbe became an active partner in the firm.

7. In May 1889 a written charter was prepared and signed by Professor Abbe creating a "Stiftung" (Foundation), to be known as the "Carl Zeiss Stiftung", and the charter was thereafter submitted to and approved by the Grand Duke of Saxe-Weimar-Eisenach.

8. Upon such approval, a legal entity or personality known as the Carl Zeiss Stiftung was created with its

domicile in the City of Jena. A "Stiftung," or Foundation, under German law, is a legal entity with power to own property, to sue and be sued, and to possess rights and have obligations like any natural person.

9. A private Stiftung, such as the Carl Zeiss Foundation, is established under German law by a declaration of intent (either in the form of an inter vivos instrument or a will), which must then be approved by the appropriate state authority.

10. On June 30, 1891, Roderich Zeiss and Professor Abbe withdrew from the Zeiss firm and all of the firm's assets were conveyed by Professor Abbe to the Carl Zeiss Stiftung.

11. Since 1891 the Foundation has continued to be the sole owner of all the assets of the Zeiss firm and through the firm to engage in the manufacture and sale of high grade precision optical instruments and related goods using the firm name and various trademarks, including trademarks consisting of the word "Zeiss", the words "Carl Zeiss Jena" in a distinctive lens frame, an empty distinctive lens frame, and the letters "C" and "Z" superimposed on one another.

12. In 1891 the Foundation also acquired a part interest in a second industrial enterprise, known as the firm "Jenaer Glaswerk Schott & Gen." (hereinafter called the "Schott firm"), a partnership engaged in the manufacture of optical glass founded in 1884 by Ernst Abbe, Carl and Roderich Zeiss and Dr. Otto Schott, a famous glass specialist.

Findings of Fact

13. Otto Schott retained an interest in the Schott works until 1919, when he conveyed that interest to the Foundation. Thus the Foundation acquired the remaining assets of the Schott firm in 1919, and since that time it has continued to be the sole owner of the assets of the Schott firm.

14. In the years between 1891 and 1945 the Carl Zeiss Foundation acquired interests in numerous other commercial enterprises, both in Germany and elsewhere.

15. In 1896 a new instrument designated a "Statut" (or Statute) was prepared by Professor Abbe, and was approved by the Grand Ducal Authorities of Saxe-Weimar-Eisenach on July 30 of that year, thus becoming effective as the charter or "Statute" of the Foundation.

16. Prior to 1900 there was no German federal law relating to foundations. The German federal Civil Code, however, which was promulgated on August 24, 1896 and became effective on January 1, 1900, contained a series of provisions on legal entities in general, including "stiftungen" or foundations.

17. Pursuant to Article 163 of the law introducing the Civil Code, Articles 85 through 88 of the Code (including various articles of the Code referred to therein) were made expressly applicable to existing foundations which had been created prior to 1900.

18. The Statute was amended by Professor Abbe shortly before his death on January 14, 1905, and as so amended was approved by the Grand Ducal authorities on December 5, 1905.

Findings of Fact

19. At this time Articles 85 through 88 of the Civil Code (as well as other Articles of the Code incorporated by reference) were applicable to the Carl Zeiss Foundation and the approval of the Statute as amended in 1905 was given subject to the provisions of those articles, in particular Article 87, permitting the appropriate government authority to change a foundation's purpose (by amendment of its statute if necessary) if the fulfillment of its original purpose had become impossible or endangered the common welfare.

20. The Grand Duchy of Saxe-Weimar-Eisenach ceased to exist in about 1920. It was united with other Thuringian principalities to form the new "Land" of Thuringia, a federal state of the German Reich.

21. The Statute was intended by Professor Abbe to serve as the charter for the Zeiss and Schott firms and to regulate the relationship of the two firms to the Foundation.

22. The purposes of the Carl Zeiss Foundation were described in Section 1 of the Statute as follows:

"A. Within the Works

"1. To cultivate the branches of precision technical industry, which have been introduced into Jena by the Optical Works and the Glass Works in cooperation with the founder of the Foundation by way of continued operation of said enterprises under impersonal ownership; in particular:

"2. Permanently to take care of the economic security of said enterprises, as well as to maintain and

develop them as industrial organizations, as a source of subsistence for a large number of people and as useful entities in the service of scientific and practical interests;

"3. To fulfil higher social obligations than individual owners could permanently guarantee, with respect to all of the employees of the enterprises in order to improve their situation in respect to their personal and economic rights.

"B. Outside the Works

"1. To promote the general interests of the branches of the precision technical industry as mentioned above within the proper sphere of activities of the Foundation enterprises as well as outside of it;

"2. To participate in organizations and measures designed for the public good of the working population in Jena and its immediate neighborhood;

"3. To promote study in natural and mathematical sciences with regard to research as well as teaching.

"The purposes of the Foundation as enumerated under A are to be carried out by the Foundation exclusively by means of the administration of its own industrial enterprises in accordance with this Statute and within the sphere of the activities of these enterprises. The purposes enumerated under B shall be carried out by the Foundation through the use of the surplus funds of the enterprises which are available to it after the purposes enumerated under A within the enterprises have been fulfilled."

Findings of Fact

It was Dr. Abbe's intention as founder to establish a private cooperative enterprise that would engage in commercial business for profit, which would be reinvested in the Foundation's commercial enterprises, with the remaining surplus, if any, to be used to assist the community (then Jena) where these enterprises were located. It was not his intention to create a charitable, eleemosenary, state-owned, or state-operated enterprise.

23. Section 3 of the Statute provided that the legal seat or domicile of the Foundation was to be in Jena. Section 121 directs that this provision "can, under no circumstances and in no manner, be legally amended or rendered inoperative."

24. Section 4 of the Statute provided for the creation of a so-called "Stiftungsverwaltung", or Special Board, with power to appoint the remaining organs of the Foundation and authority to supervise its affairs. The rights and obligations of this Special Board were entrusted by Section 5 to the agency of the local government which had general supervision over the affairs of the University of Jena. In addition to the Special Board the Statute provided for the creation of two organs which were entrusted with the duty of supervising the industrial activities of the Foundation: (1) a "Geschaeftsleitung", or Board of Management, to manage each of the Foundation's industrial enterprises (firms) and (2) a "Stiftungskommissar", or Foundation Deputy, to act as the representative of the Special Board on the Boards of Management of the firms.

The Statute also provided, among other things, as follows:

Findings of Fact

(a) Each of the industrial enterprises or firms of the Foundation, i.e., "the Optical Works (the firm of Carl Zeiss) and the Glass Works (the Firm of Schott & Genossen)" was permanently to carry on its activities under its own firm name, with its own separate assets, and under the administration and direction of its own individual Board of Management.

(b) The Board of Management of each of the firms was to consist of not more than four and not less than three members, one of whom was to be a "scientific specialist," and all of whom were to be appointed either for life or for a fixed period of time.

(c) Only an employee of one of the enterprises or firms of the Foundation having a lifetime contract of employment pursuant to Section 59 of the Statute was eligible for appointment to a Board of Management.

(d) An appointment to a Board of Management could not be made subject to revocation.

(e) Withdrawal from a Board of Management could be based only on

(1) a voluntary resignation accepted by the Special Board;

(2) the expiration of the fixed period of time for which the person had been appointed; or

(3) the termination or cancellation of the lifetime contract, which could only be effected for gross violation of duty, continued neglect of such duty, or conduct which resulted in lowering the general

esteem in which the person was held or loss of personal confidence.

(f) The members of the Boards of Management were to be appointed by the Special Board after consultation with the Deputy and the existing members of the respective Boards of Management.

(g) The Deputy was also to be appointed by the Special Board and was to exercise general supervisory powers over the conduct of the businesses by the Boards of Management of the individual firms.

(h) In conducting the affairs of the Foundation, the Special Board and the Deputy were to give due regard to the intentions of the founder, in accordance with the express provisions of the Statute and in accordance with their spirit. In so doing, they were to take into account interests of the State as distinguished from those of the Foundation only to the extent legally required of private citizens.

(i) In its capacity as proprietor of a firm the Foundation could be represented in its external affairs by an individual member of the firm's Board of Management appointed by the Special Board as "Mandatory" or "Deputy Mandatory" of the Foundation, or by two members of the firm's Board of Management acting jointly.

(j) If, at any time, a Special Board no longer existed, then until the new formation of such a body the functions of the Special Board were to be assumed by the Board of Management of the Zeiss firm.

(k) The following sections of the Statute could not be legally amended or rendered inoperative:

Section 1 (relating to the purposes of the Foundation);

Section 2 (relating to its name);

Section 3 (relating to the location of its legal domicile);

Section 4 (relating to its governing bodies); and

Sections 117 to 120 (relating to the manner in which the Statute could be amended).

25. The Statute also provided that the Foundation's business activity should have for its object, from an economical standpoint, not only the highest possible increase in net profits, but also an increase in the total economical result.

26. A majority of the sections of the Statute related directly to the management and activities of the two commercial enterprises, the Zeiss and Schott firms.

27. In June 1900 Professor Abbe prepared a set of Explanatory Notes relating to the Statute. The Explanatory Notes stated that they were intended by Professor Abbe to be annexed to the Statute and were prepared for the purpose of eliminating any possible uncertainty as to his intent with respect to the relation of the Foundation to the State and the Government authorities.

28. Under German law such explanatory notes are given great weight by German courts in interpreting the provisions of a foundation's statute.

Findings of Fact

29. In his Explanatory Notes, Professor Abbe made it clear that the Special Board, although a State agency, had its mandate from the founder and not from the State, and, therefore, regardless of its character as a Government authority, was to occupy, in connection with the affairs of the Carl Zeiss Foundation, the status of a private governing body.

30. In an earlier commentary on the draft of a new Statute written in 1891, Professor Abbe had made it clear that he did not want the enterprises of the Foundation to become "State enterprises."

31. Professor Abbe further stated, in his Explanatory Notes of 1900, that the Special Board has the following functions:

(a) representation of the Foundation in relation to third parties with respect to those matters which did not come within the sphere of activity of the business enterprises or firms;

(b) general administration of the Foundation's property distinct from the assets of the businesses;

(c) appointment of the Deputy;

(d) appointment of the members of the Boards of Management of the firms;

(e) disposal of the Foundation's profits for the purposes set forth in Section 1B of the Statute; and

(f) amendment of the Statute.

32. Professor Abbe expressly stated that the power of the Special Board to administer the property of the Founda-

tion, referred to in Section 4 of the Statute, was limited to that property which did not form part of the business assets, which were to be under the exclusive administration of the Boards of Management of the respective firms. The Boards of Management were, likewise, intended to manage the industrial activities and the business enterprises to the exclusion of the Special Board.

33. Professor Abbe further stated that pursuant to Sections 8 and 9 of the Statute any decisions in any way relating to the business activities of the firms or to their internal or external representation were within the sole competence of the Boards of Management, and neither the Deputy nor the Special Board had any power to act in these matters.

34. Professor Abbe explained that members of the Board of Management appointed for life could be removed only by a court judgment or arbitration award.

35. Professor Abbe also stated that each of the organs of the Foundation was independent of the other organs as regards the interpretation of the Statute, and that even the Special Board's interpretation was not to be binding on the Deputy or the Boards of Management.

36. With regard to the appointment of new members of the Boards of Management, Professor Abbe explained that the appointive power was exclusively that of the Special Board and that the Deputy could play only a consultative role similar to that played by existing Board members, except that the latter had veto power over the appointment of any new member whereas the Deputy had no such power.

Findings of Fact

37. After 1905 the Statute was again amended in 1931, 1935 and 1941. The 1935 amendments, however, were repealed after World War II.

38. On April 13, 1945 the United States Armed Forces occupied the City of Jena.

39. The functions of the Special Board of the Foundation were then being exercised by the office of the "Reichstatthalter" or Reichs Governor, of the Land of Thuringia, with headquarters in Weimar.

40. The post of the Foundation Deputy was occupied by Professor Abraham Esau, President of the German Government Bureau of Standards, located in Berlin.

41. The Board of Management of the Carl Zeiss firm consisted of the following persons, all of whom had been appointed to serve for life on the dates indicated:

Walter Bauersfeld	April 1, 1908
Paul Henrichs	September 30, 1926
Heinrich Kueppenbender	August 15, 1941
Georg Joos	April 1, 1943

Dr. Joos resigned as a member of the Board soon after his arrival in the American Zone in June 1945.

42. Professor Bauersfeld and Mr. Henrichs were, respectively, the "Mandatory" and "Deputy Mandatory," individually authorized to represent the Carl Zeiss Foundation externally in the affairs of the Zeiss firm.

43. The Board of Management of the Schott firm consisted of the following persons, all of whom had been appointed to serve for life on the dates indicated:

Erich Schott (the son of Otto Schott) ..... January 1, 1927
Richard Hirsch ..... April 1, 1919
Paul Henrichs 1934

(hereinafter referred to as the "Schott Board of Management").

44. The principal place of business of the firm Carl Zeiss was located in Jena and the firm had branch establishments in Berlin, Cologne, Hamburg and Vienna, and in a number of foreign countries.

45. In addition, the Zeiss firm had manufacturing facilities in Saalfeld and Gora, not far from Jena.

46. The Schott firm had its principal establishment in Jena and a branch factory in Landshut, in Bavaria, which was to be part of the American Zone of Occupation.

47. The Carl Zeiss Foundation owned the percentage interests specified below in each of the following corporations, all of which were located outside the territory allotted to the USSR as its zone of occupation:

Anschuetz & Co. GmbH	(100%)
M. Hensoldt & Soehne AG	(66%)
Zeiss Ikon AG	(70%)
Alfred Gauthier GmbH	(80-84%)
Friedrich Deckel	(30%)
R. Winkel GmbH	(100%)
Hans Kollmorgen GmbH	Not Specified
DESAG (Deutsche Spiegelglas A.G.)	(more than 50%)
Vereinigte Farbenglaswerke Zwiesel AG	(100%)
Sendlinger Optische Glaswerke Berlin AG	Not Specified
Bremthaler Quarzitwerke GmbH	Not Specified

Findings of Fact

48. The foundation also owned non-commercial assets which were used in connection with either one or both of the Foundation enterprises and managed by them. They consisted of: Volkshaus (People's House) at Jena, Optikerschule (School of Optics) at Jena, Ernst-Abbe-Buecherei (Ernst-Abbe-Library) at Jena, a children's hospital at Jena, a children's clinic at Bad Sulza, an Optical Museum at Jena, a Planetarium at Jena, Stadium sites at Jena, a Stutenhaus (vacation camp) in the Thuringian Forest, several agricultural estates, real property on the Island of Sylt (in the North Sea), and buildings in Berlin and Vienna. The Foundation also owned other real estate, in particular, residential houses in and around Jena and interests in the Carl Ziess Siedlungs GmbH and the Jenaer Gemeinnuetzige Wohnungsfuersorge A.G., both non-profit organizations holding title to housing property.

The value of the foregoing non-commercial assets was only a small fraction of the value of the commercial assets in the name of the Foundation's "firma" and its interests in commercial ventures outside of the Soviet Zone.

49. The total number of persons then employed in the various enterprises in which the Carl Zeiss Foundation had an interest, including the Zeiss and Schott firms, numbered 45,000, of whom approximately 30,000 were employed in locations outside Jena and its vicinity.

50. When the American troops first occupied the City of Jena there were employed at the Zeiss plant in Jena approximately 12,000 employees, of whom 7,000 were regular employees, 2,000 were foreign workers, and 3,000 were German laborers conscripted under German wartime labor legislation.

Findings of Fact

51. By June 1945 the 5,000 non-regular workers had left the Zeiss plant and in addition 500 of the regular workers had left the employ of the Zeiss firm.

52. The Allied Statement on Zones of Occupation issued on June 5, 1945 divided Germany into four zones. The Land of Thuringia, which included the city of Jena, was included in the zone alloted to the USSR.

53. At that time it was the established policy of the United States to search out leading German scientific experts located in territory under American control, evacuate them if necessary, and use them in connection with the continuing war effort against Japan.

54. Late in May or early in June of 1945 Dr. Kueppenbender was advised by the American military authorities that they required the Zeiss firm to establish a branch factory in the part of Germany which was to be the permanent American Zone of Occupation, where approximately 2,000 persons were to be employed, and instructed Dr. Kueppenbender to prepare a plan for the establishment of such a factory.

55. On June 13, 1945, the American military authorities notified Dr. Kueppenbender that because of lack of adequate transportation facilities the plan had been scrapped and that it had been decided instead to take only such key personnel, records and special equipment as could be loaded in fifty railroad cars. Dr. Kueppenbender was ordered to arrange for the packing of the equipment without delay.

56. On June 17, 1945, Dr. Kueppenbender called together the heads of the various departments and gave them instructions regarding the packing of the equipment.

Findings of Fact

57. On the night of June 18-19, 1945, the American military authorities notified the members of the Boards of Management of the Zeiss and Schott firms that they would shortly be removed from Jena together with a group of top scientific and technical personnel of the two firms pursuant to military orders issued by the Supreme Headquarters Allied Expeditionary Force (SHAEF) in Paris. The American military authorities made it clear to the members of the Boards of Management that since these were military orders they had no choice but to comply.

58. Under the terms of the unconditional surrender of Germany the German people were bound to carry out unconditionally all orders and instructions issued by representatives of the Supreme Commands of the United States and the other Allied Powers.

59. The American military authorities instructed the individual Board members to prepare lists for transportation to the American Zone of key personnel who would be included on a set of written orders to be prepared by the United States Army.

60. Such lists were prepared and submitted to SHAEF, where the written orders were to be prepared, but in view of the imminent arrival of Russian troops, the American military authorities decided to carry out the evacuation before such written orders were received in Jena.

61. In view of their imminent departure, the members of the Zeiss and Schott Boards of Management determined to designate certain of the remaining employees to exercise their functions in Jena during their absence. They intended to designate for the most part persons who would not be

removed by the Russians for political reasons, who would carry out the Board's wishes, and who would have the Board's confidence.

62. Three persons were selected by the Zeiss Board of Management, each of whom had been employed by the Zeiss firm for more than ten years. They were Dr. Friedrich Schomerus, Mr. Viktor Sandmann and Dr. Hugo Schrade (the "three S's"). Sandmann was at the time commercial director of the Zeiss firm and the only one of the three who was a "prokurist", i.e., a person having authority to sign on behalf of the firm and entered as such in the Commerical Register. Schrade was assistant to Kueppenbender and in charge of the planning division. Although these three had not been Nazi party members, a former Nazi, Fritz Dunger, was designated in a similar capacity to manage Schott during its Board's absence.

63. On June 21, 1945, Dr. Wilhelm Schacht, then one of the legal advisors to the Zeiss firm, was instructed by Mr. Henrichs to prepare an application to the County Court in Jena to have the names of Dr. Schrade and Dr. Schomerus also entered in the Commercial Register as prokurists of the Zeiss firm.

64. It was initially contemplated that the three S's should, as prokurists, perform the functions of the members of the Board of Management during the latter's temporary absence.

65. After further consultations among the Board members and with Dr. David of the Zeiss firm's legal department, however, it was decided, for internal purposes, to give to the three S's a formal power of attorney designating

them as representatives of the Board of Management authorized to act in their place for as long as the Board of Management was forced to be absent from Jena and prevented from exercising its management functions in Jena.

66. There is some evidence that the VIII United States Army Corps of the Ninth Army of the 12th Army Group made an attempt to set up a provincial government in Thuringia in June 1945. Thus, it appears that on June 9, 1945, a Colonel Hatch of the General Staff Corps purported to appoint a Mr. Hermann Brill as Prime Minister of Thuringia and that subsequently certain officers of the American military government in Weimar approved Mr. Brill's suggestions for appointment of a cabinet which included Mr. Walter Wolf as head of the Office of Education.

67. There is no evidence, however, that Colonel Hatch acted pursuant to any law, international agreement or directive giving the United States or the VIII Army Corps the authority to organize a new provincial government in Thuringia.

68. Under the Agreements among the Allied Powers of June 5, 1945, Thuringia had already been allotted to the USSR for occupation. The Agreements provided for the exercise of governmental authority by each Commander-in-Chief only "in his own zone of occupation."

69. On June 21, 1945, a document had been executed by Walter Wolf, claiming to be the Head of the Thuringian Office of Education and to be acting as the Special Board of the Foundation, in which he had purported to revoke the appointment of Professor Esau as Foundation Deputy and to name a Dr. Arno Barth in his place. A letter by

Mr. Wolf addressed to the Board of Management of the Zeiss firm and containing word of the appointment apparently came to the attention of Mr. Henrichs on June 22, 1945, but there is no evidence that it was ever seen by any other member of the Zeiss Board.

70. On June 22, 1945, Mr. Henrichs, acting on behalf of the Zeiss Board of Management, executed such a written power of attorney, prepared by Dr. Schacht and Dr. Walter David, legal advisers to the Zeiss firm, which provided that Messrs. Schrade, Sandmann and Schomerus were instructed to assume temporarily the duties and functions of the Board of Management for as long as the members of the Board were forced to be absent from Jena and, therefore, prevented from performing their duties.

71. Pursuant to Section 8 of the Foundation Statute, the members of the Board of Management had the power to designate authorized representatives to manage the firm's affairs as well as to represent it with respect to third parties.

72. There is no evidence that at any time prior to their departure from Jena the Zeiss Board of Management revoked or cancelled the power of attorney.

73. On June 23, 1945, Dr. Arno Barth appeared in Jena claiming to be the new Foundation Deputy. A meeting was held on that day at the Schott plant at which were present Dr. Schott, Mr. Henrichs, Dr. Barth, Mr. Hirsch and two members of the Workers' Council of the Schott firm, one of whom was Mr. Eduard Heintz. At that meeting the identity of the persons who were to take over the duties and

functions of the Board of Management of the Schott firm was discussed.

74. At no time during the meeting with Dr. Barth did Dr. Schott or Mr. Henrichs or Mr. Hirsch tender their resignations as members of the Board of Management of the Schott firm nor was the subject of resignation even discussed. Dr. Kueppenbender participated during the last part of the meeting, at which no discussion took place concerning the question of the management of the Zeiss or Schott firms.

75. At no other time prior to the departure of the Zeiss and Schott Boards of Management did any members of either Board tender his resignation to anyone, nor was the subject discussed.

76. The departure of the Zeiss Board of Management and the other Zeiss employees took place on June 24, 1945. Included among the group were 77 leading scientific experts.

77. The Schott Board of Management and the other evacuated Schott employees left Jena on June 25, 1945. Included among the group were 55 key scientific personnel.

78. The Zeiss and Schott personnel evacuated by the American military authorities from Jena on June 24 and 25, 1945 were transported to Heidenheim an der Brenz in Wuerttemberg, in the American Zone of Occupation.

79. The evacuation of the Zeiss and Schott groups was carried out pursuant to directives from the United States Joint Chiefs of Staff in Washington and General Eisen-

hower as Supreme Commander of the Allied Forces in Europe and were based on military necessity.

80. Prior to their departure from Jena, Messrs. Kueppenbender and Henrichs instructed Dr. David to go to Wetzlar, near Frankfurt in the American Zone, to look after the Foundation's interests in its subsidiary, Hensoldt & Soehne, and its other affiliated corporations outside the Soviet Zone.

81. Dr. David left Jena on June 26, 1945, and remained at Wetzlar until May 1946, when he joined the Zeiss management at Heidenheim.

82. On June 27, 1945, Dr. Barth, acting as Foundation Deputy, signed documents purporting to appoint Messrs. Schomerus, Sandmann and Schrade members of the Zeiss Board and Messrs. Dunger, Heintz and Klemm members of the Schott Board, which were signed by the purported appointees. Barth also signed a letter addressed to the Office of the Commercial Register in the County Court of Jena applying for registration of entries cancelling the appointment of Bauersfeld as Mandatory and Henrichs as Deputy Mandatory for the firm Carl Zeiss and appointing Schomerus and Sandmann, respectively, to fill the vacancies. Another letter purportedly signed by Barth and addressed to the Jena County Court requested registration of entries cancelling the prokura of Kueppenbender and Joos for the firm Carl Zeiss and noting the authority of Schrade to sign as prokurist for Zeiss.

Thus the departing Zeiss Board of Management did not resign but arranged with three trusted employees to exercise their functions during the Board's absence on the

understanding that upon the Board's return it would assume exercise of its management functions in Jena. In implementation of this arrangement, which was made necessary by the American military evacuation order and the impending arrival of the Soviet military forces, the Board executed the necessary papers to enable the three S's to function during the Board's absence. However, apparently because of fear that the Russians would not honor such delegation of authority because it came from Board members with prior Nazi connections, the caretaker management arranged with Barth for the foregoing appointments of themselves by him as the representative of an *ad hoc* government untainted by prior Nazi party connection. As a result the powers of appointment executed by the departing Board members were never used, and in lieu of them Barth and the three S's substituted the foregoing appointments, which were more likely to be acceptable to the incoming Russians and did not reveal the actual arrangements made with the Board being evacuated to Heidenheim. Thus the three S's although only a caretaker group, sought to create the false impression with the Russians that they were independently appointed and did not depend for their authority upon any persons tainted with previous Nazi connections. However, while some of the departing Board members were aware of Barth's purported status and assumption of authority to act as Deputy, they neither resigned nor participated in the substitution of the Barth appointments in lieu of the powers and prokura previously executed by them.

83. The first public announcement of the formation of a new Thuringian Government was made on July 16, 1945, more than two weeks after the United States Armed Forces

had withdrawn from that area. The notice, signed by Mr. Brill as the purported Prime Minister, recited the formation of a Government for the "Province" of Thuringia; it was dated July 2, the day following the departure of the United States Armed Forces, when the USSR was already in control of Thuringia.

84. On July 16, 1945, the Soviet Military Administration ("SMA") announced the formation of a new government for the "Land" of Thuringia with a Mr. Rudolph Paul as its president. The order of the SMA made no reference to any existing provincial government or administration.

85. On September 1, 1945, a notice was issued over the signature of Dr. Paul reciting the formation of a new administration for the "Land" of Thuringia. The notice described the geographic boundaries of the "Land" and named the persons who had been appointed to head the various ministries with the approval of the SMA. According to the description in the notice, the territory which was to comprise the "Land" of Thuringia was different from the territory described as comprising the "Province" of Thuringia in the notice issued on July 2, 1945 by Dr. Brill.

86. The notice of September 1, 1945 recited that, with the approval of the SMA, Walter Wolf had been appointed to head the Land Office for Education. The notice recited that Dr. Paul had been authorized to make appointments of directors of "the Land offices to be established for creating the administration of the Land of Thuringia" and made no reference to any existing provincial government.

87. Thus there was in existence during June 1945 in Thuringia a provincial *ad hoc* government of doubtful

legality which appointed an agency or department purporting to correspond to the description of the Special Board contained in either §5 or §113 of the Foundation Statute; and the latter in turn purported on June 21, 1945 to appoint Dr. Barth as Foundation Deputy.

88. The Foundation Statute provided that only the Special Board could make appointments to the Board of Management of the Zeiss firm with the Deputy playing only a consultative role. Moreover, the Statute expressly provided that such appointments could not be made subject to revocation.

89. Since the agreements purporting to appoint Messrs. Schrade, Sandmann and Schomerus members of the Board of Management of the Zeiss firm were not made by the Special Board and stated that they were subject to revocation by the Special Board upon the return of the departing members of the Board of Management, they did not comply with the provisions of the Foundation Statute.

90. The Statute also provided that no one could be appointed a member of the Board of Management of the Zeiss firm unless he had a lifetime employment contract with the firm.

91. As of June 27, 1945, neither Dr. Schrade nor Dr. Schomerus had a lifetime employment contract with the Zeiss firm. Both men entered into such purported contracts for the first time on November 20, 1945.

92. There is no evidence that Mr. Sandmann had a lifetime employment contract with the Zeiss firm on June 27.

Findings of Fact

93. After the purported agreements were signed, Dr. Barth summoned Dr. Wilhelm Schacht, handed him the executed documents, and instructed him to prepare and file a written application to the County Court of Jena requesting entry in the Commercial Register of the names of the three purported appointees as persons authorized to sign on behalf of the Zeiss firm and requesting the cancellation of the authorizations of the evacuated members of the Board of Management. Upon receiving these instructions, Dr. Schacht took the power of attorney of June 22, 1945, signed by Mr. Henrichs and wrote the word "gegenstandslos", or "superseded", on it.

94. On June 29, 1945, Dr. Schomerus wrote to Mr. Henrichs advising him that the appointment of a new Board of Management had been effected and executed by a notary public for registration in the Commercial Register. Dr. Schomerus made no mention of the fact that an application had been filed to have the names of the evacuated Board members cancelled in the Commercial Register.

95. On or about July 1, 1945, the Armed Forces of the United States relinquished control of the City of Jena and the Province of Thuringia to the Armed Forces of the Soviet Union.

96. On July 2, 1945, general notices were drafted and exhibited soon thereafter in the Zeiss works in which the Jena management informed the employees that the "hitherto functioning" Board of Management had been forced to leave Jena and that Messrs. Schrade, Sandmann and Schomerus had been appointed members of the Board of Management. No reference was made to any resignation. Although the notice stated that Professor Esau had been

replaced as the Foundation Deputy by Dr. Barth, the notice did not state that the departing Zeiss Board of Management had been "replaced."

97. Although the aforementioned application to the County Court was executed and filed on June 27, 1945, the requested entries and cancellations in the Commercial Register maintained at the County Court in Jena were not made until October 18, 1945. Neither the application nor the entries contained any reference to any resignation of the evacuated members of the Zeiss Board of Management.

98. The cancellation of the names of the members of the Zeiss Board of Management from the Commercial Register in Jena had the effect, under German law, of resulting in cancellations in similar Commercial Registers maintained in Hamburg, Cologne and Berlin, outside the Soviet Zone, where the Zeiss firm had branches, thus depriving Messrs. Bauersfeld, Henrichs, Kueppenbender and Joos of proof of their authority to sign on behalf of the Zeiss firm.

99. In the application filed June 27, 1945, Dr. Barth requested the County Court in Jena to enter the names of Dr. Schomerus as Mandatory and Mr. Sandmann as Deputy Mandatory. Under Section 9 of the Foundation Statute only the Special Board had the power to appoint Mandatories and their Deputies and Dr. Barth, even if properly appointed as Deputy, had no authority to make such a request. There is no proof that either Dr. Schomerus or Mr. Sandmann was ever appointed to serve in those capacities by the Special Board either orally or in writing.

100. Following the departure of the Zeiss Board of Management from Jena in June 1945 the Jena management

was advised on several occasions beginning in August 1945 that the departing Board members claimed that they were still in office and were only temporarily prevented from exercising their functions with respect to the management of the Zeiss firm in Jena and the Soviet Zone, but were continuing to function with respect to the firm's affairs outside the Soviet Zone.

101. From June 1945 until at least January 1946 the individual members of the Zeiss Board of Management in Heidenheim were addressed as "[redacted] Board of Management" in letters sent to them and signed by one or more of the members of the Jena management.

102. After the evacuation the Heidenheim management learned of the purported appointment by Barth of a new Board of Management and that the Jena management purported to act as members of the Board of Management in issuing certain powers of attorney, but the Heidenheim management had no personal contact with any representative of the Jena management until some time in early October, when a meeting took place in Heidenheim between Messsrs. Henrichs, Hirsch and Schott and representatives of the Jena management. At that meeting it became clear that there was a difference of opinion between the Jena management and the Heidenheim management over their respective legal positions.

103. On October 12, 1945, Messrs. Henrichs, Hirsch and Schott addressed a letter to the Schott management in Jena (including Dr. Schrade) in which, *inter alia*, the following statements were made:

(a) As a result of the Heidenheim meeting with representatives from the East, the writers had learned

of the "very different views" held by the representatives of Jena as to their respective positions.

(b) The writers made clear their view that they could and should develop the existing manufacturing facilities of the Schott firm outside the Soviet Zone into a second and independent manufacturing center.

(c) Because of the "hermetic sealing" of the interzonal frontier, the interests of the Foundation had to be looked after by different persons in the Soviet and in the non-Soviet occupied parts of Germany.

(d) Therefore, a second Board of Management, which alone was to be competent to manage the affairs of the Schott firm in the Soviet Zone, had been appointed for the purpose of conducting affairs in Jena during the writers' disability.

(e) By reason of their lifetime appointments the writers claimed the right and duty to look after the interests of the Foundation and the Schott firm outside the Soviet Zone.

(f) The writers declared this to be only a temporary measure rendered necessary by the division of Germany, which was to cease the moment it again became possible to engage in free economic activities throughout the whole of Germany and the writers could return to Jena. Until such time, the writers stated that they had no choice but to acquiesce in the situation created by the occupation forces and, therefore, each group would have to look after the interests of the Foundation within the territories accessible to it.

The writers also expressed their desire that mutual confidence be restored on both sides and that there be an end to "mutual antagonistic acts between the Managements responsible for the two territories, signs of which [they] had unfortunately already observed."

104. Immediately following the receipt of the letter, Dr. Barth took certain steps in an attempt to give Messrs. Schrade, Schomerus and Sandmann formal legal basis for claiming that they alone constituted the Zeiss Board of Management in accordance with the Foundation Statute.

105. On October 18, 1945, three and one-half months after the aforementioned agreements had been made on June 27, 1945 by Barth purporting to replace the Board members in Heidenheim with his appointees, the entries in the Commercial Register in Jena reflecting the change were made.

106. On October 30, 1945, the Soviet Military Administration issued Order No. 124, providing for the sequestration of certain types of property in the Soviet-occupied territory. By Order No. 156 of the Soviet military authorities in Thuringia, dated December 31, 1945, the Zeiss Works were specifically sequestrated, and notice thereof was given to the Zeiss Works, attention of Schrade.

107. On November 9, 1945, Dr. Barth addressed a letter to the Ministry of Education in Weimar as "Special Board of the Carl Zeiss Stiftung" requesting it to approve in writing the purported agreements of June 27, 1945, which he had concluded with Messrs. Schrade, Schomerus and Sandmann and pursuant to which they were purportedly to

serve as members of the Zeiss Board of Management for a two-year period subject to revocation by the Special Board if the deported members of the Board were to return to Jena.

108. Dr. Barth gave as the reason for his request the fact that the deported Zeiss and Schott Boards of Management in Heidenheim were claiming that they were the Boards of Management and that the Jena managements were only their representatives. Dr. Barth pointed out that relations between the Heidenheim and Jena gentlemen had gradually become more strained and quoted the portion of the letter of Octoger 12, 1945, in which the writers asserted that they were entitled to look after the affairs of the firm and the Foundation outside the Soviet Zone by reason of their lifetime appointments and that the second management in Jena was competent only in the Soviet Zone.

109. Dr. Barth suggested that it might be possible to remove the deported members of the Boards of Management on the grounds of their membership in the Nazi Party during the war as soon as it became clear that they were covered by new laws in the Soviet Occupation Zone regarding measures to be taken against persons with prior Nazi affiliations. No claim was made that they had resigned prior to leaving Jena.

110. On November 16, 1945, apparently in response to the request contained in Dr. Barth's letter of November 9, 1945, a letter was addressed to him by Dr. Walter Wolf, as the "Special Board of the Carl Zeiss Stiftung," in which Dr. Wolf stated that in order to prevent doubts and

misunderstandings the agreements signed on June 27, 1945, by Dr. Barth and Messrs. Schrade, Schomerus and Sandmann were being approved retroactively.

111. On November 20, 1945, lifetime employment contracts were executed between the Zeiss firm and Dr. Schrade and Dr. Schomerus. Each of the agreements recited that they were being entered into effective June 27, 1945.

112. The execution of these lifetime contracts of employment was a belated attempt to comply with the provisions of Section 26 of the Foundation Statute which required as a condition of membership in a Board of Management that the appointee be employed in the firm on the basis of an employment contract for life or a fixed period in conformity with §59 of the Statute.

113. The foregoing measures did not validate the appointment of Barth's nominees as Board members since they still failed to comply with the Foundation Statute in material respects and the existing Board had not resigned or consented, and there were no vacancies to be filled.

114. On December 27, 1945, Dr Barth again addressed a letter to the Ministry of Public Education in Weimar as the "Special Board of the Carl Zeiss Stiftung" in which he referred to his letter of November 9, 1945, and repeated that the deported Boards of Management were "again and again" claiming that they were still in office. He declared that the "new Boards of Management in Jena" did not wish to take drastic steps because of their past cooperation with the deported Management, but that this could not have any importance for him or the Special Board.

In his letter Dr. Barth requested that the Special Board sign an application prepared by him for submission to the President of Thuringia calling for the removal of the deported members of the Board of Management from their offices. This was inconsistent with any claim that they had resigned before leaving Jena, and no such claim was made by Dr. Barth at that time.

115. In attempting to secure the dismissal of the Heidenheim management, Dr. Barth acted entirely on his own and did not advise any of the members of the Jena management of what he was doing until January 9, 1946.

116. On December 28 and 29, 1945, Mr. Sandmann met with Mr. Henrichs in Heidelberg, in the American Zone of Occupied Germany, to discuss the dispute which had arisen respecting the management of the Zeiss firm, and told Mr. Henrichs that the Jena management considered that the Heidenheim management was "suspended" because of its inability to act in Jena. This was inconsistent with the present claim that they had resigned before leaving Jena, and Mr. Sandmann did not state that any such claim was being made.

117. Mr. Henrichs responded that the Heidenheim management, on the strength of a legal opinion, still considered itself in office on the basis of the lifetime appointments of its members and the absence of any grounds for dismissal. Mr. Henrichs stated that the American military authorities also considered the Heidenheim management as still in office. However, Sandmann told Henrichs that it was his view and that of his Jena colleagues that the Stiftung's interest could "only be represented exclusively

by the present Board of Management in Jena", that instructions must issue only from Jena and that all business transactions affecting the Stiftung must be effected only with Jena's consent. Henrichs promised to urge the gentlemen in the West to accept the Jena view and to acknowledge that they did so, and he asked, if that were done, that the power of attorney previously granted by Schomerus to Kuehn and Schreiber (to act for the Stiftung and the Firma Carl Zeiss in the West) be withdrawn and such a power be issued instead to the former members of the Zeiss Board.

118. At the December 28-29, 1945 meeting Mr. Sandmann informed Mr. Henrichs that Jena did not wish to see the establishment of a plant under the Zeiss firm name in the Western Zone for fear that the future of the plant in Jena would be seriously endangered by such a move. He told Mr. Henrichs that the Jena management still hoped to avoid the risk of dismantling of the plant by the Russians, which would be increased by the appearance of a new Zeiss production center in the West.

119. There is no evidence that at the Heidelberg meeting Mr. Henrichs was advised concerning any of the measures which had already been taken by Dr. Barth since the departure of the Zeiss Board of Management from Jena.

120. Mr. Henrichs did not inform Dr. David, who was residing in Wetzlar at that time, of the meeting with Mr. Sandmann or of the discussion concerning powers of attorney before Dr. David visited Jena in February 1946.

121. On December 31, 1945, the Zeiss Works were sequestrated by Order No. 156 of the Soviet military au-

thorities in Thuringia, pursuant to SMA Order No. 124 of October 30, 1945, and notice thereof was given to the Zeiss Works, attention of Schrade who was appointed sequestrator.

122. On January 9, 1946, Barth informed the Jena management of his plan to secure the official dismissal of the Heidenheim management on charges of Naziism. The Jena management agreed that, in view of the sequestration, the Heidenheim management had to be effectively removed from office, but they persuaded Barth that before such drastic action as dismissal on charges of Naziism was taken, the Heidenheim management should be given an opportunity to recognize the authority of the Jena management and to accept powers of attorney from it, as suggested at the Heidelberg meeting.

123. On January 12, 1946, the Jena management for the Zeiss and Schott firms sent a letter addressed to the "former members of the Boards of Management of the firms Carl Zeiss and Schott", attention of Mr. Henrichs, sometimes referred to as the "blackmail letter". The letter was dictated by Dr. Schomerus in Dr. Barth's presence and contained an enclosure prepared by Dr. Barth.

124. In it the writers declared that they considered it necessary to establish their legal competence as the sole Boards of Management before they could agree to any measures concerning the handling of the Foundation's affairs and those of its firms in the American, French and British zones of occupation. The letter continued:

> "It is our position that, since we were appointed as Board of Management by the Special Board on your

proposal, we are the only responsible Board of Management and you have thereby resigned. By the same token we have promised to resign at the request of the Special Board in your favor, if you should return to Jena and be able to resume your former office. You have so far taken a contrary position and speak of a Second Board of Management which is competent for the American, French, and British occupied zones. We are not able to agree with this view because of legal reasons and the necessity to have the uniform management. In addition to the fact that only the Mandatories of the Carl Zeiss Stiftung and the members of the Board of Management of the Stiftung establishments acting in Jena can be authorized to perform legally binding acts for the Stiftung and the Stiftung establishments, it is necessary, with regard to the outside world to create absolute clarity as to the competent authorities. The Zeiss Works have their domicile in Jena and there can be only one Board of Management acting here. Only if this has been made absolutely clear, both internally and externally can the certainty, required for all business transactions be established and the development and existence of the Stiftung guaranteed to the extent that this is possible within German power."

125. The letter further stated that the Special Board had prepared an official dismissal of the Boards of Management in Heidenheim on the basis of their prior membership in the Nazi Party and that Dr. Barth had informed the Jena managements about the planned dismissal on January 9.

126. The letter recited that a copy of the official application for dismissal was being enclosed but that its submis-

sion was being held up. The writers suggested that to avoid having the dismissal carried out the members of the Boards of Management in Heidenheim should voluntarily give up their appointments as Board members.

127. The letter also stated that if the Heidenheim management complied with the request their financial claims would be preserved and arrangements for the handling of the business of the Foundation enterprises in the Western Zone would be made in accordance with the wishes of the Heidenheim management.

128. Enclosed with the letter was a letter addressed to the President of Thuringia by the "Special Board of the Carl Zeiss Stiftung" and the Foundation Deputy requesting the dismissal of Messrs. Henrichs, Bauersfeld and Schott from their positions as members of the Boards of Management of the Zeiss and Schott firms on the grounds of their prior Nazi Party membership. The letter described each of the three gentlemen as "heretofore" members of the Board of Management of their respective firms, and stated that they were all lifetime officials of the Foundation enterprises and that their positions as members of the Boards of Management had thus far "not been taken from them." It also declared that these gentlemen looked upon themselves as the only authorized Board members.

129. The members of the Zeiss Board of Management had not resigned prior to their departure from Jena but had continued to regard themselves as still in office although prevented from exercising their functions by reason of their forced absence from Jena. Dr. Barth believed that the claim of the deported Board members had validity, and it was for this reason that he was threatening to dismiss

them in an effort to establish the legitimacy of the Jena management.

130. On January 12, 1946, the same date as that of the blackmail letter, Mr. Sandmann addressed a personal letter to Mr. Henrichs in which he addressed Mr. Henrichs as a "member of the Board of Management". He stated that under Order 124 of the SMA (pursuant to which the Zeiss works had been sequestered) the persons in Jena were personally responsible to the Soviet military authorities for all of the assets of the Foundation and the Foundation enterprises and that, therefore, if powers of attorney were granted to the Zeiss Board of Management in Heidenheim it would have to be clear that as far as possible all measures taken outside the Soviet Zone had the concurrence of the Jena management.

131. In his letter Mr. Sandmann also stated that it was painful to him and the other members of the Jena management to make the threat contained in the blackmail letter but declared that this was the only solution which could make a practical cooperation between the two sides possible. He closed the letter with the statement that whatever the legal consequences "nothing will change the basic attitude of the gentlemen here with regard to the agreements of June, 1945."

132. It is inferred from the reference to Order 124, that so far as Messrs. Schrade, Sandmann and Schomerus were concerned the request for recognition as the solely competent Board of Management for the Zeiss firm was based on a desire to demonstrate to the Russians that they were in a position to administer the assets of the Foundation enterprises in their own right and not as deputies or representa-

tives of the deported members of the Board of Management.

133. This conclusion is supported by Dr. David's testimony that at a meeting in Jena in February 1946 Mr. Sandmann declared that the sequestration imposed on the Jena management certain responsibilities towards the Russian occupying power but that, as regards the legal position of the Heidenheim management, the Jena management would stand by its word that the Heidenheim management could resume its functions in Jena as soon as circumstances would permit.

134. Similar statements were made to Dr. Schacht at approximately the same time by Mr. Sandmann as well as Dr. Schomerus.

135. Reference to "our obligation and responsibility towards the Occupation Authorities" is also made in the letter of March 4, 1946, addressed to the Heidenheim management by the Jena management.

136. The receipt of the blackmail letter in Heidenheim caused great concern to Messrs. Henrichs and Bauersfeld. Dr. Kueppenbender was, at that time, in an interrogation camp and did not learn of the receipt of the letter until March 1946. Henrichs, Bauersfeld and Hirsch, together with David (then acting as the legal advisor of the Heidenheim and Western Schott gentlemen), discussed the matter fully and Henrichs prepared a reply. This was the letter of January 28, 1946. David was not pleased with the letter; it weakened an earlier draft he had prepared and, in his opinion, failed clearly to state that the Heidenheim and Western Schott gentlemen had not resigned and were not

resigning. Henrichs, however, rejected David's objections, insisting that his colleagues had approved the letter and that it must be sent as it was. The letter opens with a statement of full agreement "that for legal and practical reasons there can be only one solely responsible Board of Management with its seat in Jena", and proceeds at once to negate any "dualism". The letter reads, in part, as follows:

> "We fully agree with you that for legal and practical reasons there can be only one solely responsible board of management with its seat in Jena. The difficult situation created by the events of the last summer could only become worse to the further detriment of the Stiftung, if any kind of dualism would legally and by reason of distance split up the supreme power of management exercised by the boards of management of both Stiftung establishments. In order to make possible your appointment as regular members of the Board of Management according to the Statute, we proposed you as our successors to the Deputy at the end of June last year and we handed over the business to you.
>
> "We wish to confirm clearly and free of any dou' t that since our removal from Jena we have regarded you as the sole and completely responsible Board of Management of the Stiftung Establishments internally and externally and that we will continue to do so. The undersigned Henrichs and Hirsch regret that they have apparently caused the erroneous idea in you by using in their letter of October 12, 1945 the ambiguous term, 'Second Board of Management', as if they still assigned to themselves the official title and legal position of members of the Board of Management of the Glass Works Schott & Gen. This was by no means intended. . . ."

"Since we fully agree with you in your judgment of the legal situation", the letter continues, "we think you will agree with us that the recommended resignation has become meaningless. The situation sought by this recommendation is already in existence in your favor." The writers then state that "[s]ince we no longer have any function as members of the Board of Management, . . . such function cannot be taken from us by a political proceeding of exclusion. . . ."

137. On January 28, 1946, Messrs. Henrichs, Bauersfeld and Hirsch addressed a letter to the "members of the Boards of Management of Zeiss and Schott" in Jena. The letter was prepared by Mr. Henrichs.

138. In the letter the writers expressed their disappointment and pain as a result of receipt of the blackmail letter. The writers stated that they agreed that there could only be one Board of Management with its seat in Jena and stated that they had regarded the Jena managements as the "sole and completely responsible Board of Managements" of the Foundation enterprises and would continue to do so.

139. The writers expressed their regret that they had used the ambiguous term "second Board of Management" in their letter of October 12, 1945, and stated that they had not intended to give the impression that they still assigned to themselves the official title and legal position of members of the Board of Management.

140. The writers went on to say that in view of the status quo a resignation by them would be pointless.

They declared that since they no longer exercised any functions as members of the Board of Management these functions could not be taken away from them by means of a dismissal. They thanked the Jena management for assisting them in their denazification process and asked them to protect them in the Soviet Zone so long as they were prevented from defending themselves there.

141. The letter of January 28, 1946 also explicitly refers to the understanding reached by Sandmann and Henrichs in their Heidelberg conference in December 1945, that the power of attorney previously granted to Kuehn and Schreiber would now be cancelled and new powers would be issued by the Zeiss and Schott Boards in Jena to the Heidenheim and Western Schott gentlemen as soon as the latter regained their "freedom to act" (a reference undoubtedly to denazification proceedings). Hope is expressed that the Jena Zeiss and Schott gentlemen would aid their former colleagues in such proceedings and the letter closes with the following paragraphs:

> "We have requested Dr. Schott to come here for a discussion of the preceding questions. However, he has not arrived until now. At present, there is no possibility of communication with Dr. Kuppenbender and Professor Joos. We are certain, however, that the gentlemen absent at present will fully agree with the opinion expressed by the undersigned persons.
>
> "The enclosed copy is meant for the Deputy Dr. Barth, President of the Court of Appeals. We would be very grateful if you would express our sincerest thanks to the Deputy for his understanding handling of the preceding problem and for his energetic further-

ance of the affairs of the Stiftung. . . . We would like to express our thanks to you in the same sense."

142. The January 28, 1946 letter was not signed by Dr. Kueppenbender or seen by him until the spring of 1946.

143. In acknowledging the Jena management as the sole responsible Board of Management the writers were motivated by the threat of dismissal contained in the blackmail letter of January 12, 1946. They also needed evidence within the control of the Jena management in the forthcoming denazification proceedings of the Zeiss Board of Management in Heidenheim. Nevertheless, the Heidenheim management was not coerced by the blackmail letter into resigning. They intended that the January 28 letter would constitute sufficient compliance with the demands of the blackmail letter of January 12 to enable the Jena management to issue the powers of attorney which had been discussed at the Heidelberg conference between Henrichs and Sandmann in late December, 1945. The issuance of these powers would benefit the Heidenheim group by enabling it to resume management of Foundation interests in the Western Zones while benefiting the Jena management by supporting its claim of authority.

144. The letter was not dispatched to Jena by mail but was personally handed by Dr. David to Dr. Schomerus at a a meeting at the Zeiss plant in Jena on February 11, 1946, at which there were also present Messrs. Schrade, Sandmann, Dunger, Heintz and Klemm.

145. After delivering the letter Dr. David stated to the persons in attendance that the Heidenheim managements, having been appointed members of the Boards of Manage-

ment of Zeiss and Schott for life, regarded the blackmail letter as a stain on the escutcheon of the Zeiss Foundation and refused to tender their resignations, but were nevertheless prepared to refrain from exercising their functions so long as the Jena management was in a position to do so and the Heidenheim managements were not, and they would not object to the gentlemen in Jena describing themselves as the Boards of Management since, in actual fact (*"de facto"*), they were exercising the Board functions.

146. Under German law as it then existed, a resignation, to be effective, must be clear, unequivocal, and unambiguous. An agreement to refrain from exercise of one's powers did not constitute a resignation.

147. Dr. David also informed those present that the Boards of Management in Heidenheim had received a legal opinion with respect to their position as members of the Board of Management from an attorney in Munich and suggested that a meeting take place between the Heidenheim and Jena managements in Wetzlar.

148. It is inferred that Dr. David's reference was to the same legal opinion about which Mr. Henrichs had informed Mr. Sandmann at Heidelberg on December 28-29, 1945, and on the basis of which the Heidenheim management still considered themselves as the members of the Zeiss Board of Management.

149. Schomerus replied that since the January 12, 1946 letter had been written at Barth's request, the matter of a reply to the January 28, 1946 letter would have to await consultation with Barth. Several days later Schomerus (with Sandmann standing by; neither Shrade nor the other

Jena gentlemen were present) reported to David that he had discussed the matter with his colleagues and with Barth; that they "shared the view" of the Heidenheim and Western Schott gentlemen that "at the time the interests of the firm of Carl Zeiss, both in West and East Germany, were in peril"; and that the Jena Zeiss and Schott gentlemen "would stand by their word that these [the Heidenheim and Western Schott] gentlemen could return to their desks as soon as circumstances would permit. However, no one was able to tell whether this would ever come to pass."

150. At a meeting held shortly thereafter in Jena on February 13, 1946, at which Dr. Barth and the Jena managements (but not Dr. David) were present, Dr. Barth stated, when asked by one of the members of the Jena managements about "the legal position of the old Board of Management in Heidenheim", that the Heidenheim management was to be considered as "suspended", the same term that had been used by Sandmann at his meeting with Mr. Henrichs in Heidelberg on December 28 and 29, 1945.

151. Under German law, as well as under the Foundation Statute, "suspension" is a state of contractual relationship in which the rights and duties flowing from a contract are dormant and may temporarily not be exercised, but the contract remains in effect.

152. Thus an understanding was reached that the Boards in Heidenheim would not resign but that they would, until their return to Jena, suspend, or refrain from, exercise of their functions as Board members and allow the Jena designees to hold themselves out as the Boards in order to appease the Soviet occupation authorities.

Findings of Fact

153. At the end of his visit to Jena in February 1946, Dr. David discovered that in October 1945 the names of the members of the Zeiss Board of Management in Heidenheim had been cancelled from the Commercial Register for the Zeiss firm maintained at the County Court in Jena. Under German law this deprived the Heidenheim management of proof of its authority to act for the Zeiss firm.

154. On February 18, 1946, Dr. Erich Schott, then resident in Heidenheim, addressed a letter "to the members of the firms Jenaer Glaswerk Schott & Gen. and Carl Zeiss" in response to the blackmail letter.

155. In the letter, Dr. Schott stated that while he fully agreed that the Jena management had full authority as a Board of Management he did not believe that this agreement contradicted the statements made in the letter of October 12, 1945, which spoke of two Boards of Management, each in its different zone of occupation; and that the removal of the Heidenheim management "be it through resignation or through dismissal on the basis of the anti-Nazi law" was to be prevented "by all means" because of the possibility that this would lead to the appointment of trustees and the seizure of the Foundation's properties in the American and British occupation zones. His letter read in part:

> "I agree fully with the opinion expressed by my colleagues in regard to the basic question raised by you, namely that by the appointment of the new board of management, done in complete agreement among the Foundation Deputy, the enterprise counsel and us as the sole authorized Board of Management at that time, the question of competence of the present Board of

Management was clearly determined. This question was explicitly discussed by the Foundation Deputy and us and was clearly affirmed in the sense of full authority of the new Board of Management.

"Also, this is not contradicted by the wording of our letter of October 12, 1945 which, I would admit, was somewhat unclear. But then it was not intended to clear up the legal question, but only to point out that it is necessary to protect the Foundation's interests outside the Russian occupied zone by men residing there and recognized by the appropriate military governments, which in this situation, according to my opinion, can only be done by us. I regret very much that this question was not cleared up because of the failure to answer my detailed statement of October 12, and that the meeting urgently requested therein did not come about. We therefore had to continue to act independently, as demanded by the situation, without the desired closer cooperation by the Board of Management in Jena, if we wanted to protect the important interests of the Foundation. If we had not acted in this manner a separation of the enterprises belonging to the Foundation would have been the certain result, as occurred similarly with the AEG through the splitting off of the Berlin enterprises. I would like to make it quite clear that our removal, be it through resignation or through dismissal on the basis of the anti-Nazi law, which would take from us the authority over Foundation interests in the American and English occupation zones, would lead automatically to the appointment of trustees and to the seizure of the Foundation's properties in this zone. This is what we want to prevent by all means and what has caused us

to act and to hide, if possible, the disagreement between the Board of Management in Jena and us which has become known through the numerous letters of the legal department of the glass works in which our authority to act for our firm was denied, and also to create the impression with the already suspicious military governments, that these are only temporary differences of opinion which were caused by the increased difficulties of communication. Only in this manner has it been possible for us until now to succeed in preventing a reaction of the military authorities in the form of a splitting up of the 'concerns', which would perhaps also coincide with the ambition of some gentlemen connected with our affiliated enterprises.

"You will see from this that I consider it, as before, absolutely necessary for the Foundation to have men answerable to it within the various zones. The legal manner in which this will be done is a question of purely secondary nature for which, I am sure, a solution can easily be found which will also satisfy you.

* * * * *

"1. It is not true that I consider myself a member of the sole authorized Board of Management; rather, I have expressly recognized and continue to recognize the Jena Board of Management, as well as the other gentlemen.

"2. It is not true that I maintain no contact with the newly appointed members of the Board of Management. . . ."

156. Dr. Schott's letter did not constitute a resignation by him of his membership on the Board of Management of

the Schott firm. On no occasion did Dr. Schott or the other members of the Board of Management of the Schott firm, Mr. Henrichs and Mr. Hirsch, ever resign their positions, and their lifetime employment contracts were never cancelled.

157. Acting in reliance on these two letters, of January 28 and February 18, 1946, the Jena Zeiss and Schott gentlemen, through Schomerus and Dunger, as purported Mandatories for Zeiss and Schott, respectively, executed and issued two powers of attorney, one to Bauersfeld and Henrichs and the other to Dr. Schott, Hirsch and Henrichs, authorizing the former to represent the Firma Zeiss, and the latter to represent the Firma Schott "outside the occupation zone surrounding Jena".

158. The letter of March 4, 1946, transmitting these powers of attorney, was signed by the Jena Zeiss and Schott gentlemen, as members of the Boards of Management, and reads, as follows:

> "We have noted the contents of your letter of January 28, 1946 as well as the supplementary statements of Dr. E. Schott. We have noted with satisfaction the agreement over our mutual views with respect to the fact that the Boards of Management being in office in Jena have been properly appointed and are alone competent and responsible for the management of the two establishments.
>
> "Recognizing that the former members of the Boards of Management after the restoration of their capacity to transact business are in the first instance entitled to represent the establishments in the non-Russian occupied territories and expecting that the denazifica-

tion carried on by them with our support will soon be successfully completed, we have given power of attorney to Messrs. Professor Bauersfeld, Henrichs, Hirsch and Dr. E. Schott for representing both the establishment outside of the occupation zone surrounding Jena. . . .

"In order to avoid difficulties in legal transactions, the certificates themselves do not contain the general directions and conditions for the use of the power of attorney. With regard to our obligation and responsibility towards the occupation authorities as well as for the maintenance of the uniform business policy in all occupied zones, we ask you, however, to make use of the power of attorney in case of legal affairs of greater importance only if the Boards of Management in office at Jena are themselves not in a position to look after the interests of the establishment in an appropriate way. As far as the undertaking of legal transactions is concerned which appear to you expedient or necessary, we would request you to keep in close touch with us and, if possible, to bring about prior agreement about the views and always to proceed in conformity with the tradition of the Carl Zeiss Stiftung and within the framework of the business policy carried on by the Boards of Management. In case a prior agreement is not possible, we would request you to inform us immediately after the legal transactions have been carried out.

"We ask Messrs. Professor Bauersfeld, Henrichs, Hirsch and Dr. E. Schott to give their consent to these terms of authorization by signing the identical copy of this letter."

Findings of Fact

In accordance with the request, the copy of the letter was subscribed by Henrichs, Hirsch and Schott.

159. In March 1946, Dr. David visited Dr. Kueppenbender who was then at Bad Nauheim and reported to him about the letters of January 12 and 28, about his visit to Jena and his conversations there, and about the cancellation of the names of the Heidenheim management in the Jena register.

160. After this discussion with Dr. David, Dr. Kueppenbender addressed a brief letter to the Jena management in April 1946 concerning "his legal position as a member of the former Board of Management" in which he referred to the letters of January 12 and March 4 (but not to the letter of January 28) and to his discussions with Dr. David, and agreed to the "same arrangement as has been made in the case of my colleagues, Professor W. Bauersfeld and P. Henrichs." Dr. Kueppenbender's reference to his discussion with Dr. David was intended to convey the fact that he adopted the oral qualifications which had been made by the latter in Jena in February 1946; and that he was not resigning but was willing to suspend exercise of his functions as a Board member and allow the Jena gentlemen to hold themselves out as the "Board of Management" in order to appease the Russian occupation authorities and lead the latter to believe that the Jena management was independent of "capitalistic" groups or organizations in the Western zones.

161. Dr. Kueppenbender was subsequently included in a new power of attorney issued in June 1946 to Messrs. Bauersfeld and Mr. Heinrichs. Under the terms of this

power any one of the three could act individually if the other two became unable to do so. In a letter dated June 17, 1946, transmitting the power, Schomerus wrote:

> "After the denazification of Dr. Kueppenbender we have extended to him the power of attorney for the representative of Firma Carl Zeiss outside the occupation zone surrounding Jena as already granted to Prof. Bauersfeld and Henrichs by the certificate of March 7, 1946.
>
> * * * * *
>
> "The certificates of Power of Attorney of March 7, 1946 . . . have thereby become invalid and we request you to return them to us at your convenience.
>
> "The terms fixed in our letter of March 4, 1946 and recognized by Prof. Bauersfeld and Henrichs will continue to apply to the powers of attorney declared in the new certificates. . . ."

162. The purpose of the Board members in Heidenheim in accepting these powers of attorney was to settle the dispute with the Jena management which had prevented the Board of Management from resuming its functions as such with respect to Foundation interests in the Western zones. The powers of attorney served the dual function of partially satisfying the demand of the Jena management for an appearance of authority needed to appease the Russians and of furnishing the Heidenheim management with proof of authority to represent Foundation interests, which they lacked because of cancellation of their names in the Commercial Register. Furthermore, without the powers of attorney or other proof of authority to act, the Heidenheim management might have had difficulty in keeping the Foun-

dation's interests in the West out of the reach of the Russians, who were in control of the Zeiss works in Jena.

163. In September 1946, during a second visit to Jena by Dr. David, the original powers of attorney (which had no termination date) were replaced by an irrevocable five-year power. Under the terms of the power it was to be exercised by any two of the three appointees acting jointly or by one of them acting individually if the others became incapable of acting.

In transmitting these new agreements, the Jena Zeiss and Schott gentlemen wrote letters to the Heidenheim and Western Schott gentlemen, expressly stating that the conversion of the powers to five-year irrevocable powers did not effect any changes in the terms and conditions of authority which had been set forth in the letter of March 4, 1946, and were to be read as subject to those conditions even though they were not restated in the new agreements.

164. The purpose of the new power of attorney was to give the members of the Heidenheim management long-term irrevocable powers which would afford them a legal basis for acting outside the Soviet Zone even in the event that the Carl Zeiss Foundation and its enterprises were destroyed in the Soviet Zone or the Foundation was taken over by Communist authorities.

165. The new irrevocable five-year power of attorney provided that if it was not terminated on three months' notice before the original and any subsequent expiration date, it would be automatically renewed from year to year.

166. There is no evidence that the power of attorney of September 1946 was ever revoked or in any way terminated.

Findings of Fact

167. Commencing on October 22, 1946, the Zeiss and Schott plants in Jena were almost totally dismantled. The dismantling process continued until March or April 1947. As a result 94% of all plant equipment and about 300 employees were transported to the Soviet Union.

168. In October, 1946, when first they received word of the dismantling, the Heidenheim gentlemen, representing themselves and signing as the authorized representatives of the Stiftung under the June 17, 1946 power of attorney, sent a circular notice to the Zeiss affiliates and branches in the West, stating, among other things, as follows:

> "... It cannot be estimated as yet whether and how far the Board of Management so far being in office in Jena can exercise its powers of management. By Power of Attorney of June 17 of this year ..., the following gentlemen ... have been authorized to represent the interests of the Carl Zeiss Stiftung and of the Firma Carl Zeiss outside the occupation zone surrounding Jena. To the extent that the Board of Management which has so far been in office at Jena—consisting of ... Schomerus, Schrade and ... Sandmann—is not able to deal with and decide on the questions relating to your relation to the Carl Zeiss Stiftung and the Firma Carl Zeiss, those questions will be dealt with and decided by us. We would therefore ask you to carry on from now on all correspondence and negotiations on such questions with us until the above mentioned Jena Board of Management will again contact you directly."

By November 25, 1946, however, the situation had cleared, and a second circular letter was thereupon issued, this

time by the Jena Zeiss and Schott gentlemen, as the Boards of Management, reading, in part, as follows:

> "... [W]e want to inform the firms connected with us, all branches, officers and representatives that the existence of the Carl Zeiss Stiftung as well as the legal status and ability to act of its organs and the Board of Management of the establishment have not been touched. The Special Board, the Deputy and the Board of Management continue to work. With the consent of the Occupation Powers and the competent German authorities, the Deputy and the Board of Management have decided to begin with the reconstruction of the establishment with all means independent of the dismantling. We ask all firms and offices which belong to the Carl Zeiss Stiftung and the establishment also outside of the Soviet Occupation Zone, whose relation to the Carl Zeiss Stiftung and the establishment has remained unchanged, to cooperate in the previous manner so that the Jena establishment can regain their old position and importance for the German precision, mechanical, optical and glass technical industry in spite of the present difficulties."

The Jena gentlemen advised the Heidenheim and Western Schott gentlemen that they were issuing the circular letter, noting "that the dismantling of the local works has not changed in any way the legal position of the organs of the Stiftung and the Boards of Management, or affected their capacity to act," and directing the Heidenheim gentlemen "to continue to handle your commission and your power of attorney for looking after and representing the interests of the Carl Zeiss Stiftung and the establishments in such manner as appears from the agreement into which we entered with you on March 4, 1946."

Findings of Fact

169. In December 1946, because of consideration not clear from the record (apparently the Heidenheim gentlemen became incapable of acting in Zeiss affairs until the completion of denazification proceedings, which did not occur until sometime in 1947), the Jena Zeiss gentlemen granted a power of attorney to Hirsch (who had the authority to act), explicitly stating, however, that "the same conditions apply as for your power of attorney issued by the Glass Works and as they are stated in the joint letters of the two Boards of Management of March 4, 1946." Hirsch accepted the power, agreeing to "perform the task conferred upon me to the best of my ability on the basis of my agreement of March 4 and September 6 and 7, 1946 [the agreement making the Schott power irrevocable for five years]"; and when later, in September, 1947, David advised that the denazification decrees as to the Heidenheim gentlemen had become final and that they were once again able to act, the power granted Hirsch was terminated and the Heidenheim gentlemen were restored to their positions as authorized representatives.

170. The January 28, 1946 letter did not have the effect of validating the purported appointment of the Jena group as Boards of Management. It represented only a consent to the functioning of the Jena group as a caretaker management. The Board members in Heidenheim did not resign and the purported appointment by Soviet authorities of the Jena group as Board members continued to remain legally ineffective for the reasons already stated above (see Finding Nos. 88-92).

171. As a result of the dispute precipitated by the Board's letter of October 12, 1945 from Heidenheim to

Findings of Fact

Jena (claiming its powers to function) and the exchanges and conferences between representatives of the Boards in Heidenheim and the Jena management, a compromise agreement was reached, the basic terms of which were:

(1) The January 28 letter would be accepted by Barth and the Jena management as sufficient recognition of the authority of the Jena management, and the Jena management would be permitted to hold itself out as the "Board of Management," even though the Board in Heidenheim was not resigning. Barth and the Jena management would not carry out their threat to secure the dismissal of the Boards in Heidenheim on grounds of Naziism. Instead, they would assist the Heidenheim management in their denazification proceedings in the American Zone by supplying proof of their resistance to Nazi influence at the Zeiss and Schott Works;

(2) Upon the return of the Heidenheim management to Jena the management of the Zeiss and Schott firms by the Jena group would cease to function and the Heidenheim group would resume its functions as the true Boards of Management in accordance with the June 1945 understanding;

(3) During the absence of the Boards in Heidenheim, the interests of the Foundation in the Soviet Zone would be managed exclusively by the Jena management in accordance with the June 1945 understanding;

(4) The interests of the Foundation outside the Soviet Zone would be managed by the Heidenheim group under power of attorney from the Jena group, which would coordinate with the Heidenheim group to some extent;

Findings of Fact

(5) The danger to the Foundation interests in the Western Zones presented by possible Soviet seizure of control of Foundation interests in the Soviet Zone and assertion of authority over interests outside the Soviet Zone was to be reduced by making the powers of attorney irrevocable for five years, which was done in September, 1946. The Heidenheim management, however, would not return to Jena during the period of Soviet occupation because of the hostility of the Soviet authorities towards "persons which were already then described as capitalistic groups or organizations in the western zones."

172. Under the compromise, the Jena management maintained its appearance as the true Boards of Management, avoiding its removal by Russian occupation authorities and replacement by Communist functionaries hostile to the Foundation Statute and tradition. The Jena management also reaffirmed its agreement to relinquish its functions upon return of the real Boards from Heidenheim and, in order to protect the latter's position, dropped its attempt to remove the official Boards from office and to secure their own valid appointment to the Boards of Management.

173. The grant of powers of attorney to the Heidenheim group and of considerable independence in the management of Foundation interests in the Western Zones no longer endangered the position of the Jena management in the eyes of Russian occupation authorities as much as it had earlier because Heidenheim's apparent Naziism was in the process of being removed through denazification proceedings in the American Zone, in which the Jena

management would assist. The grant of the powers themselves, accompanied by considerable independence, could be explained as necessary in view of the division between the Soviet and Western Zones and the danger of a seizure of Foundation interests in the Western Zones if those interests were controlled from the Soviet Zone.

174. Under the compromise, the Heidenheim management achieved its purposes of avoiding a statement of resignation and of resuming its management of Foundation interests in the Western Zones. These goals were obtained at the expense of writing the January 28 letter which might be claimed to constitute a renunciation of their positions, and of accepting powers of attorney from the Jena management and agreeing to accept the latter's supervision to some extent.

175. The 1946 compromise did not alter the legal position of the Heidenheim group as the true Boards of Management currently in a state of "suspension" and prevented from carrying out their functions during their absence from Jena.

176. Neither the January 28, 1946 letter nor the conduct and correspondence of the parties constituted a resignation by the members of the Boards in Heidenheim.

177. No member of the Zeiss Board of Management in Heidenheim ever tendered his resignation orally or in writing to the Special Board in Weimar or anyone understood to be purporting to act in its behalf. Nor is there any evidence that their lifetime employment contracts were ever cancelled or that they were dismissed from their offices.

Findings of Fact

178. The agreement of the Heidenheim management to temporarily refrain from the exercise of their functions as the Boards of Management, to act under powers of attorney from the Jena management, and to hold out the Jena management as the true Boards did not constitute a resignation by operation of law, effective even in the absence of an intention to resign, because such action was taken on account of the emergency situation created by the division of Germany into hostile parts in which loss of substantial Foundation assets was threatened in both the Soviet and Western Zones.

179. Thus the members of the Zeiss Board of Management in Heidenheim continued legally in office even after January 28, 1946, although they agreed temporarily to suspend exercise of their functions and to act outside the Soviet Zone on the basis of powers of attorney from the Jena management.

180. The 1946 compromise served as a basis for cooperation between the Heidenheim management and the Jena management until the spring of 1948 when the situation was drastically altered by expropriation in the Soviet Zone. The Jena group continued to manage Foundation interests in the Soviet Zone and to hold itself out as the Boards of Management. Foundation interests in the Western Zones were managed by the Heidenheim group under power of attorney from the Jena group. Although the Heidenheim group considered itself responsible for these interests as the Boards of Management, it acted under the powers of attorney instead of seeking recognition of its true position as the Boards of Management in order to comply with the demand of the Jena management, which

believed that the power of attorney arrangement was necessary to protect itself from Soviet occupation authorities and to maintain the unity of the Foundation under the direction of Jena in accordance with the Foundation Statute and tradition.

181. The arrangements made in 1945 and 1946 were not inconsistent with the Statute of the Foundation. Section 7 does not preclude that under special circumstances the number of the members of the Board of Management may exceed four. This applies *a fortiori* to the appointment of an acting caretaker Board of Management to function in the absence of the original Board.

182. The Federal Supreme Court of Germany, in a decision rendered in July 1957 in an action between the plaintiff Zeiss firm in Heidenheim and defendant VEB Carl Zeiss Jena determined on the basis of an examination of the exchange of correspondence in January 1946 and the powers of attorney of March 1946 that, as a matter of German law, the members of the Zeiss Board of Management did not resign but merely agreed not to exercise their functions while they were absent from Jena and to recognize the competence of the Jena management to act in their place. The Federal Supreme Court so found without the evidence in this case that the letter of January 28, 1946, was delivered with an oral explanation making it clear that no resignation was intended.

183. The 1946 compromise did not alter the legal position of the Jena group as a caretaker management exercising the functions of the true Boards of Management while the latter were "suspended" during their absence

from Jena. No attempt was made to improve the legal position of the Jena management as the validly appointed Boards of Management until 1951, see Finding No. 365.

Meanwhile, as the Heidenheim and Jena managements continued to act on the basis of the 1946 compromise, the purported two-year appointments were disregarded and expired. The Court rejects Schrade's testimony that in 1947, shortly before the expiration of two years from June 27, 1945, the date of the original appointments, Barth advised the six gentlemen in Jena that their two-year appointments were to be deemed extended for life.

184. The members of the Heidenheim management continued to consider themselves responsible for the affairs of the Foundation in the West as the original members of the Board of Management.

185. In accordance with the 1946 compromise the Heidenheim Board, in addition to use of the powers of attorney given them, avoided indicating their true position as members of the Boards of Management. Thus in a letter of June 18, 1947, from Henrichs to Bayerische Beamten Versicherungsanstalt, a Munich insurance company, in response to its inquiry, Henrichs wrote:

> " . . . I cannot let him [an officer of the insurance company] have a decision valid for Jena, because my colleagues and I, transplanted by the Americans to this place two years ago, are no longer members of the Board of Management of Firma Carl Zeiss, the domicile of which is in Jena according to its Statute so that the seat of the Board of Management must be in Jena, too."

Findings of Fact

186. In keeping with the compromise agreement, from early 1946 until at least mid-1948 (upon the nationalization of the Zeiss and Schott Works in Jena, the Heidenheim Boards consistently referred to themselves not as Board members but rather as the authorized representatives ("bevollmaechtigte Vertreter") for Zeiss or Schott (as the case might be) under their powers of attorney, and referred to the Jena Zeiss and Schott gentlemen as members of the Boards of Management. During that period of more than two years, there was no writing, internal or otherwise, in which the Heidenheim or Western Schott gentlemen signed or were designated as the Boards of Management or members of the Boards. The Jena Zeiss and Schott gentlemen repeatedly addressed letters to them which they (the Jena gentlemen) signed and in which they referred to themselves as the Boards of Management for Zeiss and Schott or the Stiftung Mandatories (who, under the Statute, of course, had to be Board members); and in which they characterized the Heidenheim and Western Schott gentlemen as the "old" or "former" Boards or Board members. Conversely, the Heidenheim and Western Schott gentlemen and David and other of their subordinates repeatedly sent letters to Jena in which they addressed and referred to the Jena Zeiss and Schott gentlemen as the Boards of Management, members of the Boards, or Mandatories.

187. Thus, for example, in a letter of January 31, 1947, addressed by Henrichs to Schomerus, as member of the Board of Management for Zeiss, Henrichs characterized the Heidenheim gentlemen (including himself) as "the old Board of Management." Another example appears in an

internal memorandum by Henrichs dated April 18, 1947, stating that:

> "Schrade believes that he can acknowledge the continuation of the statutory rights as a matter of principle and will soon bring about the comment and decision with the Deputy and the Board of Management of Schott in Jena. . . ."

188. The Heidenheim management also addressed and referred to persons of the Jena management as "members of the Board of Management" for reasons of convenience. For example, in a personal letter of February 22, 1946, to Schrade, Henrichs wrote in part, as follows:

> " . . . I learned from Sandmann that you have to work even more than everybody else and that the greatest burden of the work and responsibility in Jena probably rests on your shoulders. Moreover, you are also a member of the Board of Management of Schott and will have to give your good advice in important matters there as far as your time permits."

189. Similarly, on June 27, 1946, in a letter addressed to Schomerus, as a member of the Zeiss Board of Management, Henrichs acknowledged receipt of the power of attorney, confirmed that the Heidenheim gentlemen intended to use the Opton name and urged that Schomerus and the Board of Management send letters for use in Henrichs' denazification proceeding.

190. The Jena management employed similar usage. For example, in a letter of August 18, 1947, to Henrichs, written and mailed by Schomerus while visiting in the British Zone,

he reported that certain proposed amendments to the Foundation Statute were being considered by the Special Board in the Soviet Zone and that the pension rights question had been discussed at "the last meeting of the Boards of Management with the Deputy".

191. None of these writings evidences a course of conduct inconsistent with the arrangements made between the Boards in Heidenheim and the Jena management in 1946.

192. With respect to the actual management of Foundadation interests in the Western Zones as distinguished from formal authority, the Heidenheim group sought to act with as much independence as possible on the grounds that it was the true Board of Management. On the other hand, the Jena management sought to supervise the management of Foundation interests in the Western Zones in order to maintain its appearance to the Soviet authorities of being the Boards of Management.

193. In accordance with the 1946 compromise, the Heidenheim group conceded that the Jena group had some voice in the management of Foundation interests in the Western Zones. Thus during the period from January 28, 1946 to June 1, 1948, numerous writing were exchanged between the Heidenheim management and the Jena management, and on numerous occasions the views, consent or concurrence of the Jena management were sought in such matters as the pension rights of the Zeiss personnel in the West, the amounts of jubilee payments and other matters of a similar nature.

194. The use of the powers of attorney by the Heidenheim management in accordance with the 1946 understand-

ing is illustrated in the incorporation of the Opton company to conduct business in Heidenheim.

195. One of the main purposes of the American military forces in transferring the Zeiss Board of Management and the Zeiss firm's top scientific and managerial personnel to the American Zone of Occupation was to establish there a Zeiss enterprise capable of operating and producing equipment needed by the United States Armed Forces to help in prosecuting the war in the Pacific Theatre.

196. Although it had been planned to transfer from Jena to Heidenheim the equipment and blueprints necessary for the production of scientific and optical instruments, and such equipment and blueprints had actually been packed for transportation to Heidenheim, they never arrived at their destination.

197. Because of the failure of the equipment and blueprints to arrive in Heidenheim, the first task which faced the Zeiss group was the preparation, from memory, of blueprints for the construction of machines to be used in the production of scientific and optical instruments.

198. At the same time with the assistance of the American Occupation authorities, the Zeiss group was able to obtain equipment belonging to the Zeiss firm from Bavarian caves in which such equipment had been hidden. In addition, the American Occupation authorities released certain industrial space located at Oberkochen, a small town neighboring Heidenheim, for use by the Zeiss group.

199. Soon after the arrival of the Zeiss group in Heidenheim, an office of the Carl Zeiss firm was established under

the name of the "firm Carl Zeiss, Heidenheim office," on the premises of the Voith firm, and thereafter Mr. Henrichs maintained his office there.

200. In the summer of 1946, the Zeiss group obtained space in the Leitz factory in Oberkochen where they commenced preparation for the establishment of production facilities. At that time the group consisted of approximately 200 employees (90% of whom had been formerly employed at the Zeiss works in Jena).

201. On or about October 4, 1946, a limited liability company was organized in Heidenheim under the name of "Opton GmbH."

202. Opton's principal assets consisted of the Oberkochen production facilities.

203. With the exception of 3 million marks which the Heidenheim management brought with them from Jena in 1945, no funds originating in Jena were used in connection with the establishment and development of the production facilities at Oberkochen.

204. This new company was established to engage in the manufacture and sale of optical and precision mechanical instruments, and its entire capital of 1,000,000 RM was subscribed by the Foundation in Jena; 950,000 RM through Dr. Riedinger, acting under a power of attorney granted on June 25, 1946, by Sandmann, as Mandatory, and the remaining 50,000 RM indirectly for the Foundation by Dr. Hansen and Mr. Steinle, both acting under a trust agreement with the Foundation.

Findings of Fact

205. The formal articles of the Opton Company, for which David was responsible, expressly stated that Riedinger was acting for the Carl Zeiss Foundation, domiciled at Jena, by virtue of the June 25, 1946 power of attorney and made express reference to the 950,000 RM capital contribution by the Foundation.

206. Opton's articles of incorporation included a clause according to which the members of the Heidenheim management were to be the exclusive representatives of the Foundation with respect to Opton as long as they had power to represent the Foundation outside the Soviet Zone of occupation.

207. The reason that a separate entity instead of a branch factory of the Zeiss firm was organized to build up production facilities in the West was that in the opinion of the Jena management the creation of a branch would have increased the likelihood of dismantling of the Zeiss plant in Jena by the Soviets. Mr. Sandmann had warned Mr. Henrichs of this possibility at their meeting in Heidelberg in December 1945.

208. Ninety-five per cent of the capital stock of Opton was issued directly to the Carl Zeiss Foundation and 5% to two named individuals to be held in trust for the Foundation.

209. During the 1946-1948 period the Heidenheim gentlemen called the attention of the Zeiss Board in Jena to matters affecting the businesses of Opton and other subsidiaries of the Stiftung in West Germany, and they solicited the advice and consent and acquiesced in the decisions

of the Jena Zeiss gentlemen on such matters, even though on occasion the decisions did not accord with the recommendations made by the Heidenheim gentlemen. Thus, they sought the approval and consent of the Jena Zeiss gentlemen for jubilee bonus payments and severance payments to Opton employees in Heidenheim; for the designation of new managers for firms in the West; for the formulation and adoption of policies in the operation of those firms; for the cancellation of prokurist registrations and the appointment of new prokurists for such firms; and for the grant and extension of leaves to employees of Opton.

210. The name of Opton was changed to "Zeiss Opton GmbH" in January 1947. Pursuant to the arrangement between the Jena and Heidenheim managements relating to the issuance of the powers of attorney, the Heidenheim management sought and obtained the Jena management's concurrence in this action.

211. It was initially proposed that the name "Zeiss Opton" be used for the new company, but Sandmann rejected the proposal, insisting that the new firm must first prove its capability to produce goods of Carl Zeiss quality. When the articles were thereafter amended to change the name to "Zeiss Opton", the change was not put into effect until first the consent of the Jena management had been obtained.

212. The circumstances relating to the dispute as to the pension rights under the Foundation Statute and Foundation Pension Statute of the employees at Heidenheim illustrate that the borderline between the authority of the Jena and Heidenheim managements was not always free

from controversy. The Jena management was seriously concerned with the pension rights of the Heidenheim employees because recognition of those rights would subject the Zeiss and Schott firms *in Jena* to substantial liability during a period of financial difficulty.

213. The pension question was apparently first raised early in 1946, but was not resolved. In August 1946, however, Kueppenbender issued a written statement to the Opton employees, on behalf of the Firma Carl Zeiss, declaring that notwithstanding their departure from Jena and employment at Opton, their rights under their employment contracts with the Firma Zeiss were not affected. Neither the Jena Zeiss gentleman nor Barth had authorized the statment, and, when it came to their attention, they vigorously objected; this appears from a letter of Sandmann to Henrichs, of October 11, 1946, reading, in part, as follows:

> "The Board of Management does not acknowledge the statement of Dr. Kuppenbender because it exceeds by far the scope of the promises made so far. We have so far unequivocally declared that a clarification of the rights of the deported persons shall not be made at this time, because individual cases may demand a different decision under certain circumstances and an objective examination of individual cases is not possible at present. . . .
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> ". . . No responsible authority . . . has made an announcement that a general decision concerning the legal position of the deported persons has now been made. Since the view of the Jena Board of Manage-

ment with respect to this problem has been sufficiently known, it was not correct either that this statement of great importance was issued without contacting Jena. . . ."

214. A letter of October 17, 1946, from Schomerus to Riedinger and others (who comprised a committee of scientists employed at Opton) similarly repudiates the Kueppenbender statement.

". . . the statement of Dr. Kuppenbender of August 26, 1946, starts from a legal position which we cannot acknowledge much less can we acknowledge the further legal consequence which you derive from it . . . [T]here is no necessity and . . . no possibility to issue a general regulation at this time. We can only say that the employment by Opton G.m.b.H. will not affect previously existing legal relations. Our opinion has been reaffirmed in the meeting of the Board of Management with the Deputy of October 9, 1946, where it was expressed that we will maintain our attitude, i.e., to look benevolently upon the deserving individual case. . . ."

Transmitting a copy of this October 17 letter to the Heidenheim gentlemen, Schomerus, on behalf of the Zeiss Board, wrote, as follows:

"The statement of Dr. Kuppenbender [of August 26, 1946] is a decision of such far reaching importance that it can only be made by the Board of Management in agreement with the Deputy. . . ."

215. In a meeting with the Heidenheim gentlemen at Heidenheim in January 1947, Sandmann reiterated that the gentlemen in Jena insisted that the Kuppenbender

declaration of August 26, 1946, had not been authorized and must therefore be retracted. An internal memorandum of that conference prepared by David reports Sandmann as stating that the powers of attorney granted to the Heidenheim gentlemen must be restricted to use only "in extreme cases", that is, "emergencies" and "not in the regular course of business" and that the "regular course of business shall remain with the management in Jena; they carry the responsibility". Sandmann asked that this limitation be observed and that declarations such as the one relating to pension rights be issued only from Jena and not by the Heidenheim gentlemen under their powers of attorney. David's memorandum reports that a heated discussion ensued, in the course of which David asked if Jena intended to dispense with the "know how and experience" of the Heidenheim gentlemen, an attitude he found difficult to understand since exactly one year ago, the authorized representatives had to renounce, under extraordinarily painful circumstances, the exercise of their authority, and that if anyone had cause to complain about the policies of the Jena Board "it would be the *Heidenheim members of the Board of Management*". Whereupon Sandmann, retreating from his firm stand, agreed that he would recommend to his colleagues in Jena that they accord more authority to the Heidenheim gentlemen.

216. The Jena group also attempted to supervise the management of Foundation interests in the Western Zones other than the Heidenheim-Oberkochen facilities, particularly in matters of general importance.

217. For example, on March 21, 1947, Sandmann, writing on behalf of the Zeiss Board of Management, informed

Dr. Kuehn (then the manager of the Winkel firm in Goettingen) that his salary as manager of the Winkel firm was being increased.

218. On April 21, 1947, Sandmann sent Henrichs a set of instructions prepared for use by Zeiss affiliated firms, among which was one prohibiting the managers of such firms from engaging in other compensated activities without the "consent of the Board of Management of the Firma Carl Zeiss of Jena".

219. Similarly, in a letter of January 15, 1948, from the Zeiss Board of Management in Jena to the manager of Winkel in Goettingen, the use of the trademark "Zeiss Winkel" was approved for products then being manufactured by the Winkel firm in Goettingen because those products were of a satisfactory quality, but withholding permission to use the mark on new products before examination by Jena to assure that they were "products of highest quality."

220. The Jena group also became involved in the management of Foundation interests in Western Zones when the authority of the Heidenheim management was called into question.

221. When Henrichs became concerned about a misunderstanding among some persons in Jena as to the loyalty of the Heidenheim gentlemen to the Stiftung and its enterprises, he sent a letter to the Board in Jena, on April 30, 1946, asking that "the Board of Management take appropriate steps to stop this" and suggesting that "the Board of Management call a meeting of the superior officers and colleagues and give the relevant explanations."

Findings of Fact

222. When, in 1946 or 1947, Dr. Kuehn (then the manager of the Winkel firm in Goettingen and later, in the 1960's, a member of the Heidenheim Board of Management for Zeiss) refused to transfer certain machines from Goettingen to the Opton plant in Oberkochen until he had secured Jena's approval, Kueppenbender urged Sandmann to instruct Kuehn to do so; and the Heidenheim gentlemen proposed, in order generally to clarify the relationship between Jena and Heidenheim, that a regulation be adopted which would require all employees of Zeiss subsidiaries in West Germany to follow the instructions of the Heidenheim gentlemen unless they had clear instructions to the contrary from Jena.

223. In June 1945 Jena was the headquarters of the Foundation in accordance with its Statute and tradition. The domicile of the Foundation was there. Its Boards of Management were there. Its only "Works", i.e., industrial enterprises directly owned by the Foundation and operated in accordance with the Statute, were there. Although it had substantial interests in what later became the Western Zones of Germany, these were in the form of affiliated companies, i.e., subsidiaries, which were not operated as "Works" governed by the Statute. However, the Statute did contemplate the possible establishment of other "Works", managed by their own boards of management, outside of Jena. Also, in accordance with the Statute, the Foundation owned non-industrial assets principally located in Jena and maintained close relations with the community of Jena and its university.

224. By the spring of 1948 the Foundation and its interests were drastically altered as the result of a series of

unusual circumstances that developed in post-World War II, occupied Germany: the division of Germany into hostile Soviet and Western Zones; the Soviet sequestration and dismantlement of the Zeiss and Schott works in Jena; the development of "Zeiss Opton" production facilities at Oberkochen and elsewhere in the Western Zones that would be able to manufacture and sell scientific and optical instruments of the type formerly made at Jena; and, finally, the 1948 Soviet expropriation of the Foundation's commercial assets.

225. In December 1945 the Russians sequestered the Zeiss works on the basis of Order No. 124 and named Dr. Schrade as the sequestrator. Under the law then in effect in the Soviet Zone, a sequestrator had exclusive responsibility for management of the sequestered properties and was solely and personally responsible to the Soviet authorities, and not to the private owner, for their administration. Thus, after December 1945 Dr. Schrade was the only member of the Jena management with any legal authority to administer the assets of the Zeiss firm in the Soviet Zone of Occupation.

226. Under Order 124, the trademarks used in connection with the sequestered assets were expressly included in the sequestration.

227. Shortly after the dismantling of the Zeiss and Schott plants (see Finding No. 167), a so-called Expropriation Commission was organized in Thuringia with the task of determining which sequestered assets were to be returned to their private owners and which were to be expropriated and transferred to public ownership.

Findings of Fact

228. During the period from July 1945 to about June 1948 the production facility at Oberkochen was in the process of being established and it was physically unable to produce and sell commercially scientific and optical instruments.

229. The first commercial sales were made by Zeiss Opton in 1947 and consisted of spectacle lenses made at Oberkochen and photographic lenses (marked "Tessar") made at the branch factory of Zeiss Opton in Coburg in the American Zone.

230. Sales in the American, British and French Zones of Germany and in West Berlin were handled by the sales offices of the firm Carl Zeiss in Hamburg, Berlin, Munich, Stuttgart, Frankfurt and Cologne.

231. The first commercial sales of scientific instruments produced at Oberkochen were made in about June 1948, at which time the Zeiss group at Oberkochen numbered approximately 800 employees.

232. Zeiss Opton was not an ordinary affiliated company of the Foundation but was operated by the Zeiss Board of Management as a "Works" governed by the Foundation Statute to the extent that the unusual circumstances of post-war Germany permitted.

233. Similar circumstances existed with respect to the Schott firm, the Board of Management of which was located at its branch factory at Landshut in the Western Zone.

234. The Foundation interests in the Western Zones were to a large extent managed by the Zeiss and Schott

Boards of Management located in Heidenheim and Landshut, with limited supervision from the caretaker management in Jena.

235. Heidenheim and Landshut thus became in fact new centers of the Foundation, equal in importance to Jena in the administration of the Foundation's interests.

236. In the unusual circumstances of post-war Germany, this development did not violate the Foundation Statute. Although the intentions of the founder, Abbe, as reflected in the Statute, stressed the importance of Jena as the home of the Foundation, this affinity for Jena was not based on considerations other than that it was the place where the Foundation had originated and where it anticipated it would continue to exist. In view of the increasing probability of the destruction of the Foundation industrial enterprises in Jena by Soviet occupation authorities whose increasing hostility to the Foundation was indicated by the sequestration, dismantling and threatened expropriation of the Zeiss and Schott Works, Abbe would not have barred the creation of a new home for the Foundation in the Western Zone.

237. Some time during the spring of 1948 the Expropriation Commission in Thuringia, which had been organized by the Soviet occupation authorities after their sequestration of the Zeiss firm's assets, voted to include the Foundation enterprises Zeiss and Schott on a list of business enterprises whose sequestered assets were to be expropriated and not returned to their private owners.

238. Dr. Schrade was a member of the Expropriation Commission but abstained from voting on the motion to expropriate the assets of the Zeiss and Schott enterprises.

Findings of Fact

239. On April 17, 1948, the Soviet Military Administration issued an order (No. 64) ratifying the action of the Expropriation Commission.

240. In February 1948 the Soviet Military Administration had created the German Economic Commission, a body which was to supervise the establishment of a new socialist economy in the Soviet Zone.

241. The German Economic Commission issued two decrees implementing SMA Order 64 and providing that trademarks were to be included among sequestered business assets which were being expropriated unless expressly excepted therefrom.

242. There is no evidence that any such exception was made in the case of the Zeiss works in Jena, and it was understood by the personnel at the Zeiss works as well as by the officials of the People's Owned Enterprises (VEB) which took possession of the assets of the Zeiss firm that the trademarks were parts of the assets of the VEB.

243. The decree confirming the expropriation, issued on June 1, 1948, by the Government of the Land of Thuringia, stated that the expropriation extended to the "Optical Mechanical Works Zeiss, Jena, as well as all other assets which had been 'sequestrated in accordance with Order No 124,' without exception."

244. A similar decree was issued by the Government of Thuringia on June 1, 1948, confirming the expropriation of the Schott works.

245. Under the law then in effect in the Soviet Zone of occupation, expropriations were in principle intended to

encompass assets of the expropriated owner everywhere in Germany, including the Western Zones of occupation.

246. The expropriation of the assets of the Zeiss and Schott firms deprived the Carl Zeiss Foundation of all of its industrial and commercial assets in the Soviet Zone of occupation.

247. The assets of other enterprises in the Soviet Zone in which the Foundation had an interest had been expropriated earlier, so that after June 1948 the Foundation was no longer engaged in any industrial or commercial activity in the Soviet Zone.

248. After the expropriations the Jena managements no longer performed any functions or had any functions to perform with respect to the Foundation enterprises Zeiss and Schott.

249. After the expropriations there were no functions for a Foundation Deputy to perform under the Statute in the Soviet Zone.

250. After the expropriations the Foundation ceased to be entitled to receive any profits from the operation of the Zeiss and Schott firms in the Soviet Zone.

251. After the expropriations the Foundation no longer had any Reserve Funds in the Soviet Zone for the payment of pensions and for other purposes as required by the Statute and no longer had any profits to dispose of.

252. There was therefore no further functions for a Special Board to perform in the Soviet Zone after June

1, 1948, and the Foundation organs thereafter in fact ceased to function and the holding of Foundation meetings was discontinued.

253. The Special Board, Foundation Deputy and Boards of Management of the Foundation enterprises were shortly thereafter formally abolished as organs of the Foundation by a resolution adopted by the German Economic Commission on June 16, 1948. There is no evidence that this Resolution has ever been revoked.

254. The resolution provided that a committee to be appointed by the Commission was to prepare a new statute for the Foundation for submission to the Commission, "taking into consideration the economic and social changes which have meanwhile occurred."

255. The resolution provided that until the coming into effect of the new statute, the powers of "all the governing bodies of the Foundation" were to be exercised by a State Commissioner appointed by the Commission and that the Commissioner would decide on which provisions of the old Statute were to be applied or submit suggestions with respect thereto to the Commission.

256. The resolution did not specify what relationship the People's Owned Enterprises Zeiss and Schott would have to the Foundation but provided that their "rights and duties in relation to the Carl Zeiss Foundation [would] be laid down in the new version to be drawn up of the Statute of the Foundation"

257. In adopting its resolution of June 16, 1948, the German Economic Commission rejected a proposal made

by Dr. Schrade in a letter which he had addressed to the Commission on May 25, 1948.

258. In his letter Dr. Schrade had requested that, in order to permit retention of control by the East over the assets of the Foundation in the Western Zone and to prevent the establishment of a Foundation in the West with the capacity to build up enterprises there which could compete with the Jena enterprises, it was desirable that the Commission adopt a resolution requiring the nationalized enterprises to continue to perform the functions assigned to them under the Statute of the Foundation, which should be continued in effect.

259. Pursuant to its resolution of June 16, 1948, the Commission appointed Professor Rompe as State Commissioner and transferred to him the functions of all the organs of the Foundation.

260. However, no new statute was ever prepared as required by the resolution, and Professor Rompe never exercised any functions as Commissioner.

261. The fact that there were no functioning organs of the Foundation in accordance with the Statute after June 1948 is confirmed by the failure to appoint anyone to replace Dr. Barth after his death in 1949 and to replace Dr. Schomerus after his retirement in March 1949.

262. It is not clear whether the expropriations extended to the non-industrial assets of the Foundation. There is no evidence that they were expressly excluded from the expropriation measures and neither Dr. Schrade's letter of May 25, 1948, nor the Resolution of the German Economic Commission gave any indication that the non-industrial

assets remained the property of the Foundation after the expropriation. In any event, after the expropriation they were no longer managed by the Boards of Management of the Zeiss and Schott firms and the Deputy as before, but were financed and administered directly by the state.

263. The expropriation of the industrial assets of the Carl Zeiss Foundation was clearly inconsistent with the will of its founder, Ernst Abbe, and rendered it impossible for the Foundation to continue to carry on any commercial activities or to fulfill its statutory purposes in the Soviet Zone. The Statute demonstrates that the commercial enterprises owned and operated by the Foundation formed its *raison d'etre*. Indeed, Professor Abbe had expressly provided that in the event of their loss the Foundation was to be liquidated and not left to continue as a mere holder and administrator of non-industrial property.

264. On November 30, 1948, the firm name Carl Zeiss was cancelled in the Commercial Register of the County Court of Jena, and a new entry was made declaring that the firm "Carl Zeiss" had become the "property of the people." The firm name remained registered, however, in the Commercial Registers of Berlin, Hamburg and Cologne, where the firm had branch establishments.

265. On November 20, 1949, a further entry was made in the Commercial Register of Jena correcting the prior entry so as to change the name of the firm Carl Zeiss to "Optik Carl Zeiss Jena VEB". The initials VEB stand for "Volkseigenerbetrieb" or people's owned enterprise.

266. From June 1948 until May 1951 the confiscated Zeiss and Schott enterprises formed a part of the V.V.B.

Optik, an association of people's owned enterprises engaged in manufacture of precision mechanical and optical instruments, of which Dr. Schrade was the Chief Director.

267. In May 1951 the two enterprises were separated from the association and became independent legal entities directly subordinated to the Ministry of Machine Construction in East Berlin and under the control of other state agencies.

268. At the same time Dr. Schrade was appointed Works Director of both the Zeiss and Schott VEBs and in that capacity was solely responsible to the Ministry for Machine Construction for the management of the enterprises.

269. Since that time the internal and external operations of the enterprises have been under the direct control of the East German Government and subject to governmental orders and decrees.

270. At the time of the expropriation of the Foundation's assets in the Soviet Zone, the Foundation owned directly, as part of the assets of the Zeiss and Schott firms, the following properties in the American, British and French Zones as well as various intangible property, including patents, trade names and trademarks, bank accounts and claims:

1. Branch offices of the Zeiss firm in Heidenheim, West Berlin, Hamburg, Cologne, Frankfurt, Munich and Stuttgart. Through these branches, the Foundation continued to carry on business outside the Soviet Zone under the firm name Carl Zeiss in these various locations since the assets of the branches formed a part of the assets of the Zeiss firm under the Statute.

2. A factory for the manufacture of glass at Landshut in Bavaria which formed a part of the assets of the Schott firm, and sales branches of the Schott firm. The Foundation thus also continued to carry on business under the firm name Jenaer Glaswerk Schott & Gen. outside the Soviet Zone.

271. The Foundation also had interests in all the corporations outside the Soviet Zone listed in Finding No. 47 as well as in Zeiss Opton GmbH.

272. Under German law as interpreted and applied in the Western Zones, the expropriations did not reach or affect any of the Foundation's assets in those zones or later in the German Federal Republic (West Germany), which was formed on September 21, 1949.

273. The total value of the industrial assets of the Foundation (excluding intangibles) located in the American, British and French Zones of occupation as of June 1948 amounted to approximately 30 million marks. The Foundation owned no industrial assets in the Soviet Zone of occupation after the expropriation, and even assuming it still owned some non-industrial assets in Jena, these assets were valued at only approximately 3 million marks.

273A. From approximately June 1948 until the end of September 1953, when the assets of Zeiss Opton were merged with those of the firm Carl Zeiss, Zeiss Opton engaged in the production and sale (in the United States as well as in other countries) of optical instruments and scientific equipment using principally the trademarks "Opton", "Zeiss Opton", "ZO", and certain marks used

by the Carl Zeiss firm prior to 1945, including "Tessar", "Sonnar", "Umbral" and "Punktal".

273B. During the period June 1948 to October 1953 the production facilities at Oberkochen were engaged in the production of only a limited line of products because of physical and financial impediments to the production of a full line of products such as had been included in the pre-war production program at Jena.

273C. In 1953 the Oberkochen facilities experienced their first year of profitable operation. 1954 and 1955 were loss years, but since 1956 the Zeiss firm in Heidenheim has operated at a profit.

274. The members of the Heidenheim management were informed about the expropriation of the Foundation's industrial assets in the Soviet Zone shortly after June 1, 1948.

275. The expropriation of the industrial assets of the Foundation in the Soviet Zone and the consequent shift of the principal center of its activities to Heidenheim removed a basic reason for the agreement made by the Heidenheim management in 1946 to refrain from exercising their functions as members of the Board of Management, i.e., protection of the Jena enterprises and the Foundation's economic interests in the East. With the basis of the agreement gone, the members of the Heidenheim management were no longer bound not to exercise their functions.

276. In a meeting with the Heidenheim management in October 1948 Mr. Sandmann stated that since the expropriation no boards of management or Deputy existed

in the East in accordance with the Statute. He was then informed that certain steps had been initiated by the Zeiss management in the West in order to save the Carl Zeiss Foundation and its enterprises outside the Soviet Zone.

277. Earlier in 1948 Dr. David had held informal discussions with the Ministry of Education of the State of Wuerttemberg-Baden with respect to possible governmental action which might be taken to preserve the Foundation in the Western part of Germany in the event it should be deprived of its industrial properties in the Soviet Zone.

278. On July 30, 1948, the Zeiss and Schott Boards of Management in Heidenheim made a written request to the Ministry of Education for the issuance of an administrative act or decree creating a new domicile for the Foundation in Heidenheim and creating a "Vorstand", or Administration, for the Foundation to exercise the functions of the Special Board in accordance with the Foundation Statute. Although the letter to the Ministry was signed by the members of the Zeiss and Schott Boards of Management as "authorized agents" of the Foundation and the letter recited that they were acting as such pursuant to powers of attorney issued by the Foundation in Jena in 1946, the letter described each of them as a "member of the Board of Management" of his respective firm and declared that each had been appointed to serve in that capacity for life.

279. Following the submission of the letter of July 30, 1948, discussions were held between Dr. David and officials of the Ministries of Education and Justice of Wuerttemberg-Baden during which the Minister of Justice suggested that instead of creating a new supreme organ for the

Foundation as proposed in the letter of July 30, 1948, it would be more appropriate to designate the members of the Zeiss Board of Management in Heidenheim as empowered to administer the affairs of the Foundation and exercise the functions of the Special Board pursuant to Section 114 of the Statute.

280. Section 114 of the Statute provided that if at any time a Special Board as defined by the Statute no longer existed, then until the new formation thereof, its functions were to be taken over by the Board of Management of the Zeiss firm.

281. On February 23, 1949, the Ministry of State of Wuerttemberg-Baden issued an administrative act or decree amending Section 3 of the Foundation Statute by adding Heidenheim as a legal domicile of the Foundation. The administrative act also decreed that the affairs of the Foundation were to be administered by Messrs. Bauersfeld, Kueppenbender and Henrichs as members of the Zeiss Board of Management pursuant to Section 114 of the Statute.

282. The State of Wuerttemberg-Baden, created by the American Occupation Power in September 1945, comprised parts of the former states of Baden and Wuerttemberg and included the counties of Heidenheim and Stuttgart. (In 1951 the pre-War states of Baden and Wuerttemberg were combined to form the State of Baden-Wuerttemberg.)

283. The Proclamation creating the State of Wuerttemberg-Baden provided that German law as in effect at the time of the Occupation was to be applicable until repealed or superseded by new laws enacted by the Control Council

for Germany (consisting of the four Allied Commanders-in-Chief) or by Military government or the State of Wuerttemberg-Baden itself.

284. The Proclamation vested full legislative, judicial and executive powers in the State of Wuerttemberg-Baden and any other states created in the American Zone.

285. This grant of full legislative, executive and judicial powers was reaffirmed in Proclamation No. 4 issued March 1, 1947.

286. The decrees of the Wuerttemberg Government were intended to give the Carl Zeiss Foundation in Heidenheim legal confirmation of their authority to claim and administer the assets of the Foundation in the Western world, including the United States.

287. The decision to establish a new domicile for the Foundation in Heidenheim was reached after a thorough study of the legal considerations by the Ministries of Education, Justice and State of Wuerttemberg-Baden.

288. While the decree of February 23, 1949, was issued in response to an application by the Heidenheim managements, it could have been issued even without receipt of such an application, since the Soviet expropriation of its assets and destruction of its Jena management, leaving very substantial assets and personnel with a *de facto* administration in Heidenheim, was a matter of public interest necessitating that the right of the Boards in Heidenheim to continue its statutory functions be legally recognized.

Findings of Fact

289. Although Section 121 of the Foundation Statute provided that Section 3 relating to domicile could not be legally amended or rendered inoperative, under German law this restriction was not binding on the State.

290. Based on the decree of February 23, 1949, the Ministry of Education of Baden-Wuerttemberg issued a Certificate on May 7, 1949, stating that the domicile of the Carl Zeiss Stiftung was at Heidenheim and that Messrs. Bauersfeld, Kueppenbender and Henrichs were authorized, as members of the Zeiss Board of Management, to represent it and administer its affairs under Section 114 of the Statute.

291. The Certificate of May 7, 1949 was intended to give the members of the Heindenheim management evidence of their authority to act as the Zeiss Board of Management.

292. This document was thereafter in fact used to evidence the proper authority of Messrs. Bauersfeld, Henrichs and Kueppenbender to act as the Zeiss Board of Management.

293. The decree of February 23, 1949, recited that it was issued pursuant to Section 87 of the German Civil Code. Section 87 provides that if the fulfillment of a purpose of a foundation becomes impossible, the "appropriate authority" can either change the foundation's purpose or dissolve it. Section 87 also provides that in changing the purpose of a foundation the intention of the founder is to be taken into consideration to the extent possible, and it expressly authorizes the amendment of the statute of a foundation to the extent necessary to effect a change in its purpose.

294. While the German Civil Code did not come into effect until 1900, after the creation of the Carl Zeiss Founda-

tion, under Article 163 of the Law Introducing the Civil Code §§85 through 88 of the Code (including other Sections of the Code referred to therein) were made expressly applicable to existing foundations created prior to 1900.

295. Since 1900 German foundations, as contrasted with so-called Gotha mining companies, have been governed by, and regarded as creatures of, German federal law, even though the land authorities have been delegated the administrative task under the Federal Civil Code of approving foundation statutes, exercising general supervisory functions over foundations domiciled in their territories, and adopting supplementary regulations.

296. Under well-established principles of German constitutional law the administration of federal laws may be delegated to the "laender" or states, and when a state issues administrative acts in execution of federal law such acts are deemed to be acts of the federal government and as such are binding throughout the territory of Germany.

297. The state supervisory function may be used to enforce German federal law and make sure that the organs of a foundation comply with the provisions of such law.

298. The only state law relating to foundations domiciled in Thuringia was a Thuringian executive ordinance of May 16, 1923, entitled "Ordinance of Execution of the Civil Code". The preamble of the Ordinance of Execution recited that it was issued on the basis of a Thuringian law of March 20, 1923, relating to the issuance of ordinances executing federal law concerning the administration of justice in the provinces.

Findings of Fact

299. Thus in February 1949 the Carl Zeiss Foundation was governed by its Statute as interpreted under German federal law, by substantive provisions of the German Civil Code, and by local laws or ordinances implementing the Civil Code. It was, therefore, a German—and not a Thuringian—"national" or entity. The fact that the Province of Thuringia had adopted an executive ordinance implementing the Civil Code by designating which of the various provincial government agencies was to act as the "appropriate authority" within the meaning of §87 of the Civil Code did not have the effect of making a foundation domiciled in Thuringia a Thuringian "national".

300. In its commercial activities and relationships the Foundation was subject to the provisions of the German Commercial Code, which was adopted in 1897.

301. There was no provision of German law (federal or state) in effect in 1949 which prohibited a foundation from changing its domicile from one federal state, or land, to another.

302. As a German national legal entity the Foundation could change its statutory domicile from one federal state to another like any German corporation, and no provision of German law prohibited such a change.

303. Although there appears to be no German case decided prior to 1949 considering the question whether a new domicile for a foundation could validly be created pursuant to §87 of the German Civil Code, in its decision of July 31, 1954, the District Court of Stuttgart, in an action brought on April 28, 1954, by the Council of the District of Gera in its purported capacity as Special Board of the Foundation

against the Zeiss firm in Heidenheim, decided that the 1949 Wuerttemberg decree and certificate were not void for lack of jurisdiction.

304. Under the German Civil Code the power to dissolve a foundation, which is expressly granted by §87, encompasses the lesser power to create a new domicile where this is deemed necessary to effect a change in purpose.

305. At the time of the issuance of the 1949 administrative act the assets of Zeiss Opton GmbH as well as substantial assets of Zeiss Ikon AG were located in Wuerttemberg-Baden. The original Board of Management administered Zeiss Opton and the other Western assets of the Foundation from Heidenheim, and a substantial number of employees of the Foundation enterprises were located in Wuerttemberg. Thus the center of the industrial activities of the Foundation and the place from which those activities were administered were both located in Wuerttemberg.

306. Because the expropriations and the Resolution of the German Economic Commission of June 16, 1948, had eliminated the Foundation's industrial activities and governing organs in the Soviet Zone and had rendered the Foundation Statute inoperative there, the Foundation no longer had any administrative center or domicile in Jena.

307. Thus after June 1948 the domicile of the Carl Zeiss Foundation was *de facto* in Heidenheim and not in Jena.

308. Although generally the "appropriate authority" within the meaning of §87 of the German Civil Code and the authority exercising general supervisory powers over a foundation are government authorities of the state of statu-

tory domicile, German law also permits the authorities of the state of the *de facto* domicile of a foundation to exercise supervisory powers and take action to implement §87.

309. The Government of Wuerttemberg-Baden assumed jurisdiction with respect to the Carl Zeiss Foundation pursuant to §87 on the basis of the location in that state of the Foundation's administrative center, its industrial assets, and management and numerous employees of firms in which the Foundation owned an interest. The Government deemed it to be in the public interest to preserve the Carl Zeiss Foundation, and was persuaded that the Foundation could no longer continue to fulfill its statutory purposes in the Soviet Zone in view of the expropriation of its assets there and the elimination of its organs and the transfer of their powers to a State Commissioner.

310. Notice of the issuance of the Wuerttemberg Government's decree of February 23, 1949, apparently did not come to the attention of defendant VEB in Jena until some time in November 1951, when it was apprised of the decree in connection with a proceeding pending in the German Patent Office in Munich. However, there is no evidence that under German law defendant VEB was required to be notified either of the pendency of the application or the issuance of the administrative decree.

311. On May 22, 1954, the Minister of Education of Wuerttemberg issued a further administrative decree amending Section 3.of the Statute of the Carl Zeiss Foundation so as to eliminate reference to Jena as a legal domicile of the Foundation.

312. Under German law the administrative decrees of February 23, 1949, and May 22, 1954, and the certificate of

May 7, 1949, were valid and binding on all persons and agencies in the territory of the Federal Republic of Germany until and unless revoked by the issuing authority or set aside by a German administrative court.

313. The administrative decrees and certificates have never been revoked by the Wuerttemberg Government. On the contrary, in 1956 the Government confirmed their validity and binding effect.

314. There is no evidence that any administrative court of West Germany has ever declared the Wuerttemberg administrative decrees or Certificate invalid or void or set them aside.

315. The Wuerttemberg administrative decrees of 1949 and 1954 and the Certificate of May 1949 were attacked by the Council of the District of Gera in an action brought against the Government of Wuerttemberg in the Administrative Court in Stuttgart in October 1954. In a decision rendered on September 29, 1961, the Administrative Court dismissed the action on the ground that there was no Special Board within the meaning of the Statute existing any longer in Thuringia and that the Council of the District of Gera was not authorized to bring suit on behalf of the Foundation as its legal representative.

316. On April 9, 1964, the Administrative Court of Appeals of Baden-Wuerttemberg affirmed the decision of the Administrative Court of Stuttgart.

317. An appeal from the decision of the Court of Appeals was dismissed by the Supreme Federal Administrative Court on January 15, 1965.

Findings of Fact

318. The administrative decrees of 1949 and 1954 and the Certificate of May 1949 are no longer open to challenge before any administrative court in West Germany.

319. Consequently, the administrative decrees of 1949 and 1954 are fully valid and binding, and under German law they made Heidenheim the *de facto* domicile of the Zeiss Foundation, its legal domicile.

320. On August 3, 1967, the Parliament of the Federal Republic of Germany adopted legislation purporting to confirm the validity of measures taken by the Governments of the West German states to maintain or continue the existence in West Germany of foundations which had their legal domiciles as of May 8, 1945, in what later became the Soviet Zone, including measures taken to transfer such domiciles to West Germany, even though such measures might be in derogation of provisions of a Foundation's Statute.

321. The expropriation of the Foundation's assets in the Soviet Zone resulted in the elimination of the principal establishment of the Zeiss firm in Jena, and the firm name was cancelled in the Commercial Register at Jena on November 30, 1948.

322. Since the expropriations the principal establishment of the Zeiss firm has been at Heidenheim, to which the center of gravity of the Foundation's business enterprise carried on under the Zeiss firm name shifted simultaneously with the confiscation of its assets in the East.

323. On October 20, 1950, Messrs. Bauersfeld, Henrichs and Kueppenbender filed an application with the County

Court at Heidenheim for the entry of the firm Carl Zeiss in the Commercial Register of Heindenheim as an individual firm having its domicile at Heidenheim and the entry of the Carl Zeiss Stiftung, likewise domiciled in Heidenheim, as its owner.

324. The application also requested the entry of the names of Messrs. Bauersfeld, Henrichs and Kueppenbender as members of the Board of Management of the Zeiss firm, the name of Professor B.. ersfeld as Mandatory of the Carl Zeiss Foundation in matters of the Zeiss firm, and the name of Mr. Henrichs as Deputy Mandatory.

325. The application recited the expropriation of the assets used by the Foundation to carry on business under the firm name Carl Zeiss in the Soviet Zone. It also recited the existence of assets of the Carl Zeiss Stiftung in the Federal Republic, including the branch establishments of the Zeiss firm in Berlin, Hamburg and Cologne, and the intangible right to use the firm name Carl Zeiss.

326. The requested entries were made in the Commercial Register in Heidenheim on January 15, 1951.

327. By virtue of a resolution dated July 20, 1953, the assets of Zeiss Opton were merged with the assets of the Zeiss firm, and Zeiss Opton was liquidated.

328. Since October 1, 1953, the Zeiss firm has regularly used the trademark "Carl Zeiss" in a distinctive lens frame in connection with goods produced in West Germany and shipped to the United States.

329. In its decision of July 24, 1957, the Federal Supreme Court expressly determined that the enterprise conducted

under the firm name "Carl Zeiss" in Heidenheim and entered in the Commercial Register there pursuant to the application of October 20, 1950, was legally identical with the Foundation enterprise "Carl Zeiss" which had formerly been domiciled in Jena.

330. Plaintiff Zeiss Ikon AG was organized in September 1926 through the merger of a number of other stock corporations.

331. On October 4, 1926, it was registered in the Commercial Register of the County Court in Dresden, Saxony, Germany, where it had its principal place of business.

332. Since the organization of Zeiss Ikon AG, approximately two-thirds of its outstanding capital stock has been owned by the Carl Zeiss Foundation.

333. Since its organization Zeiss Ikon AG has engaged in the manufacture and sale of photographic equipment and related goods using trademarks consisting of the words "Zeiss Ikon", the words "Zeiss Ikon" in a distinctive lens frame, and other trademarks.

334. Goods produced by Zeiss Ikon AG in Germany and bearing the Zeiss Ikon trademarks have been continuously sold in the interstate commerce of the United States since 1926, except for the period 1941 to 1947.

335. In June 1947 the Ministry for Economics and Economic Planning of the Government of the Land of Saxony, located within the Soviet Zone of Germany, expropriated the enterprise Zeiss Ikon AG of Dresden without compensation, effective July 1, 1946.

Findings of Fact

336. The "Zeiss Ikon" trademarks were included in the expropriation.

337. At the time of the expropriation as well as on July 1, 1946, Zeiss Ikon AG owned and operated manufacturing plants in Stuttgart, Wuerttemberg, in the American Zone of Germany, and in West Berlin, which plants remained unaffected by the expropriation.

338. On March 3, 1948, a special meeting of the stockholders of Zeiss Ikon AG was held in Stuttgart in the American Zone of Germany at which a resolution was duly adopted transferring the domicile of Zeiss Ikon AG from Dresden in the Soviet Zone to Stuttgart.

339. The by-laws of Zeiss Ikon AG then in effect provided that meetings of stockholders could be held in Dresden, Berlin, Stuttgart or Jena.

340. An entry recording the transfer of domicile of Zeiss Ikon AG from Dresden to Stuttgart was made in the Commercial Register of the County Court in Stuttgart on August 18, 1948.

341. In a judgment rendered on February 14, 1958, in an action between plaintiff Zeiss Ikon AG and an East German People's Owned Enterprise calling itself "VEB Zeiss Ikon Dresden," the Federal Supreme Court of West Germany expressly upheld the validity of the transfer of domicile of plaintiff Zeiss Ikon AG from Dresden to Stuttgart.

342. The transfer of domicile of Zeiss Ikon AG was legal and effective under German law.

Findings of Fact

343. Thus, plaintiff Zeiss Ikon AG is identical with the corporation of that name organized in 1926 and domiciled in Dresden until its expropriation in 1947.

344. There is no evidence that after the Soviet expropriation of the Foundation's commercial assets and prior to April 24, 1950, anyone in Jena purporting to act on behalf of either defendant VEB Carl Zeiss Jena or any alleged Foundation in Jena claimed to have any rights with respect to trademarks formerly used in West Germany and elsewhere by the Zeiss firm.

345. Prior to the expropriations in June 1948 the Zeiss trademarks had, at all times, been registered in the name of, and used exclusively by, the Zeiss firm and formed a part of the assets owned by the Foundation in its capacity as proprietor of the firm.

346. In October 1949 a meeting took place among Messrs. Bauersfeld, Kueppenbender, Henrich, Hirsch, Schott, David and Sandmann, the central subject of which was the rights of the Carl Zeiss Foundation and of its enterprises in regard to trademarks and trade names outside the Soviet Zone.

347. In that meeting the Heidenheim management made it clear that in their view only they and not the expropriated works in the East were entitled to the Zeiss name and marks and that they were not willing to give up the good will of the firms symbolized by the trade names and trademarks. They offered, however, to permit the VEB in Jena to use the marks on the basis of a license agreement.

Findings of Fact

348. On February 17, 1950, Messrs. Bauersfeld and Kueppenbender (signing for the Zeiss firm) and Messrs. Henrichs, Hirsch and Schott (signing for the Schott firm) addressed a letter to VVB Optik (the association of State owned enterprises of which defendant VEB Carl Zeiss Jena then formed a part).

349. The letter claimed ownership, on behalf of the Foundation, of the firm names "Carl Zeiss" and "Jenaer Glaswerk Schott & Gen." and all registered trademarks, patents, copyrights and other industrial property used by the firms. The letter also claimed the right to prohibit infringing use of the trademarks and other industrial property and expressly reserved the right to do so with respect to use by the VVB Optik.

350. The letter proposed, *inter alia,* discussions looking towards a license agreement pursuant to which the state-owned Zeiss enterprise at Jena would be permitted to use the trademarks in the West.

351. On April 24, 1950, two letters prepared by Schacht were signed by Sandmann on behalf of the Foundation and sent to Heidenheim and Stuttgart. The first letter directed to Opton in Oberkochen took the position that the Zeiss Foundation still existed in Jena and had entered into agreements with Optik Carl Zeiss Jena VEB with regard to trademarks in the Western Zones, and did not recognize the Heidenheim claim for license fees.

352. Thereafter communications and correspondence relating to the licensing proposal were exchanged between Jena and Heidenheim during the years 1950 and 1951, and Mr. Henrichs met in West Berlin with Dr. Schrade

and Mr. Sandmann in July 1950 to discuss Heidenheim's licensing proposal.

353. The discussion did not result in any concrete agreement, but in June 1951 the Zeiss Board of Management in Heidenheim agreed, at defendant VEB's request, to extend the time of the latter to respond to the proposal.

354. Meanwhile, in August 1950 the Zeiss Board of Management in Heidenheim had applied to the newly reorganized German Patent Office in Munich for registration of the Zeiss trademarks in the name of the Zeiss firm in Heidenheim. Notice of the application came to the attention of defendant VEB in November 1951.

355. Late in 1950, on the occasion of a threatened seizure in Hamburg of a shipment of goods from VEB Zeiss in Jena, discussions took place between Dr. Schacht and officials of the Ministry of Machine Construction in East Berlin with respect to the possible revival of the Foundation in Jena for purposes of placing it in a position to claim trademark rights in the West.

356. It was the view of certain legal officers of the Ministry, as well as of Dr. Schacht, that the Foundation could be revived only by returning the confiscated assets of the Zeiss and Schott firms to the Foundation on the basis of its Statute.

357. Since this was deemed impossible because of its incompatibility with the Communist system of economic organization based on state ownership of the means of production, it was determined that an effort should be made to "warm up" the Foundation by re-establishing its govern-

ing bodies and appointing persons to fill various positions on them.

358. According to Dr. Richter, then Legal Advisor to the Minister of Machine Construction in East Berlin, the East German authorities considered the Foundation extinct and would not have given it any further thought if it had not been for the facts that the Zeiss Board of Management in Heidenheim in the West had claimed the trademarks and that Jena products bearing the marks were threatened with seizure in the West.

359. Since the Ministry of Education of Thuringia refused to act as the Special Board of the Foundation or make any appointments of other organs without receiving express instructions from the East German Government authorities in Berlin, a letter was dispatched on May 17, 1951, by the Minister of Machine Construction, Ziller, to the President of Thuringia instructing the latter to appoint Dr. Kunz as the new Foundation Deputy and to appoint Dr. Schrade, Mr. Sandmann and Dr. Harting as an "organ of the Carl Zeiss Stiftung" for Zeiss and Dr. Schrade, Mr. Dunger, Mr. Heintz and Mr. Klemm as an "organ of the Carl Zeiss Stiftung" for Schott. Dr. Schrade was described as Works Director and the other persons were described by titles which they held as employees of the VEBs.

360. The Ziller letter stated that the matter was urgent because the West was expected to file an action in the very near future.

361. Nothing contained in the Ziller letter indicated that Dr. Schrade or Mr. Sandmann was considered as then

holding any office in any organ of the Foundation or of its enterprises.

362. No governmental body in the Province of Thuringia had been exercising the functions of the Special Board in accordance with the Foundation Statute. The letter recited that all functions of the organs of the Foundation had been transferred to Professor Rompe in accordance with the Resolution of the German Economic Commission of June 16, 1948. In addition, the letter stated that the Ministry of the Interior had initially been asked to make the appointments of the Deputy and other organs, but that it had been pointed out that this would not be in accordance with the Foundation Statute and the request was, therefore, being directed to the President of Thuringia.

363. On May 29, 1951, a meeting was held at the Zeiss plant in Jena, the stated purpose of which was the "refilling of the organs of the Carl Zeiss Foundation."

364. The minutes of that meeting recite that it had been decided by the Ministry of Machine Construction and the Ministry of the Interior to make the organs of the Carl Zeiss Foundation again capable of functioning pursuant to the provisions of the Foundation Statute. The minutes also recite that the functions of the Special Board had again been assigned to the Ministry of Public Education of the Province of Thuringia, which had been instructed to make certain appointments.

365. On June 27, 1951, a letter was addressed by a Mr. Rudolph as representative of the Ministry of Education for the Province of Thuringia to Messrs. Schrade,

Sandmann, Dunger, Heintz and Klemm in Jena informing them that the Special Board of the Carl Zeiss Foundation had appointed them "as organ of the Carl Zeiss Foundation for the management of the industrial activity by virtue of paragraph 4 of the Foundation Statute, such appointment to take effect June 27, 1945."

366. There is no evidence that Dr. Harting ever received a letter of appointment. In 1951 Dr. Harting was already 80 years old and had been retired for many years. He died within a few months after the events of May and June 1951 and no one was appointed to replace him until April 1954. There is no evidence that he ever attended a Foundation meeting.

367. The purported appointment of June 27, 1951 was the first written appointment ever received by Dr. Schrade or Mr. Sandmann from any government agency purporting to be the Special Board of the Foundation.

368. The letter of June 27, 1951 spoke of appointment for the management of the "industrial activity" although as of that time the Foundation was not engaged in any industrial activity in Jena, nor did Dr. Schrade or the other appointees have any functions with regard to any industrial activity of the Foundation elsewhere.

369. The fact that the letter states that the appointment was retroactive to June 27, 1945, makes it clear that prior to June 27, 1951, no valid appointment of any kind had been made.

370. The formalities carried out in May and June 1951 in Jena were a mere sham for the purpose of giving defen-

dant VEB a legal basis for claiming the Zeiss name and marks in the event of litigation in the West.

371. After the "warning up" of the Foundation organs in May 1951 little effort was made by the East German authorities or defendant VEB to observe the requirements of the Statute regarding appointments to the various organs or to make use of the Foundation until after the outbreak of litigation between East and West in February 1964.

372. Thus, when Dr. Harting died in 1951, leaving Dr. Schrade and Mr. Sandmann as the only members of the so-called "Board of Management," no one was appointed to replace Dr. Harting, although this would have been required by Section 7 of the Foundation Statute, which provided that a replacement had to be appointed within one month.

373. When Mr. Sandman fled from Jena to the West in March 1953, leaving Dr. Schrade as the sole remaining member of the "Board of Management" and leaving the Foundation without a Mandatory or Deputy Mandatory for Zeiss, no new appointments were made.

374. Except for nominal representation in minor court proceedings, no steps were taken to have the Foundation assume control of such non-industrial property as it may have continued in its name in and around Jena. Such property continued to be administered and subsidized largely by the VEBs Schott and Zeiss and by the East German state or subdivisions thereof. It was not until 1953, in anticipation of the dispute between the parties, that any attempt was even made to separate the adminis-

trative functions relating to such property from the VEBs and to transfer them to the newly established "Foundation administration" in Jena.

375. On December 3, 1951, Messrs. Bauersfeld, Henrichs and Kueppenbender addressed a registered letter to Dr. Schrade in which they proposed that defendant VEB be permitted, subject to the right of revocation at any time and subject to the claims recited in the letter of February 17, 1950 to sell its products using the Zeiss marks outside the Soviet Zone through the West German Zeiss sales organization.

376. The letter stated that the license was to be subject to the agreement that in the event of any future disputes between the parties neither side would contend that by reason of the arrangement one party had forfeited its right to prohibit the other party from using such trademarks or to sue for infringement.

377. Messrs. Schrade and Sandmann instructed Dr. Schacht to discuss this matter with Mr. Chemnitz, head of the Central Administration at the Ministry of Machinery Construction, because they did not feel authorized to adhere to the conditions of the Heidenheim management without his consent.

378. Following such a discussion between Dr. Schacht and Mr. Chemnitz a letter was sent to Dr. Schrade by Mr. Chemnitz on February 25, 1952, advising Dr. Schrade that the East German Government deemed it expedient to adhere to the proposals laid down in the letter of December 3, 1951, from the Carl Zeiss Stiftung in Oberkochen, and Dr. Schrade was instructed to "proceed accordingly."

Findings of Fact

379. The Chemnitz letter provided the basis for a "modus vivendi" with Heidenheim through the tacit observance of the conditions set forth in the letter of December 3, 1951.

380. Thereafter until some time in 1953, with minor exceptions, products of the VEB were sold outside the Communist Bloc countries in accordance with the conditions laid down in Heidenheim's letter of December 3, 1951.

381. At the beginning of 1953 the Carl Zeiss firm in Heidenheim was advised that the sales of products produced in Jena by defendant VEB for export had been taken over by a state trading organization known as "DIA".

382. Upon receipt of this information Mr. Henrichs wrote to DIA stating that the Zeiss firm in Heidenheim was willing to permit DIA to use the Zeiss name and trademarks in connection with the goods produced by defendant VEB only if DIA accepted the conditions on which cooperation between the Heidenheim and Jena enterprises had been previously based. At the same time the Zeiss firm in Heidenheim addressed a circular letter to its foreign distributors, including Carl Zeiss, Inc., advising them of these facts.

383. Thereafter until approximately February 1954 correspondence was exchanged between Carl Zeiss in Oberkochen and DIA relative to the Zeiss firm's proposal, but no agreement was ever reached.

384. On February 12, 1954, the Zeiss firm in Heidenheim advised DIA that since the parties had failed to come to an agreement regarding the licensing proposal, the

Zeiss firm intended to take legal steps to protect its rights in the Zeiss name and trademarks.

385. On February 18, 1954, the Zeiss firm addressed a circular to all its foreign distributors, including Carl Zeiss, Inc., advising them of the termination of negotiations with DIA and instructing them to cease handling Jena products bearing the Zeiss marks and to cease using the Zeiss trademarks in connection with the promotion and sale of Jena products.

386. In February, 1954, the new trademark law of the German Democratic Republic (East Germany) was enacted and the registries were there reopened for trademark registration, the Zeiss marks being registered in the name of the Jena "Foundation" as owner.

387. On February 27, 1954, the Zeiss firm in Heidenheim obtained an injunction in the District Court in Goettingen enjoining the West German distributor of defendant VEB's products from selling or promoting such products bearing the Zeiss marks in West Germany.

388. On April 8, 1954, in anticipation of litigation in the West, a written agreement was entered into pursuant to which the purported Carl Zeiss "Foundation" in Jena purported to license defendant VEB to use the Zeiss trademarks. The agreement recited that it was intended to confirm an alleged oral license which had been granted in 1948, although the evidence establishes that no such oral license had ever been granted and that the trademarks had been expropriated in 1948 together with other industrial assets of the Foundation.

Findings of Fact

389. The purported license agreement did not provide for the payment of any royalties to the Jena "Foundation" nor were any royalties ever paid.

390. On April 10, 1954, written documents were executed by the Council of the District of Gera in its purported capacity as Special Board of the Foundation purporting to appoint Messrs. Mueller and Hueber "for the management of the industrial activity" of the Jena "Foundation". Similarly, a document was executed purporting to designate Schrade "to represent the Carl Zeiss Stiftung of Jena in accordance with Section 9 of the Statute as Mandatory of the Carl Zeiss Stiftung" effective retroactively as of March 16, 1953. These steps were taken in anticipation of, and in an effort to bolster Jena's legal position with respect to, a court action which Jena planned to commence in West Germany.

391. Shortly thereafter, on April 28, 1954, the Council of the District of Gera, a political subdivision of the East German State, purporting to act as Special Board of the Carl Zeiss Stiftung, brought an action in the District Court of Stuttgart, West Germany, against the Zeiss firm in Heidenheim and Messrs Bauersfeld, Henrichs and Kueppenbender.

392. In that action, the Soviet Zone plaintiff sought to have the entry of the Zeiss firm stricken from the Commercial Register in the County Court of Heidenheim; to have certain trademarks (including all the Zeiss trademarks in issue here) which were registered in the name of the Zeiss firm, transferred to and re-registered in the name of the Carl Zeiss Stiftung of Jena; and to enjoin the

individual defendants from purporting to act as the legal representatives of the Carl Zeiss Foundation.

393. On July 31, 1954, the District Court dismissed the action on the ground that the Council of the District of Gera was not the legal representative of the Carl Zeiss Foundation and therefore had no authority to bring the action.

394. The decision of the District Court of Stuttgart was affirmed by the Court of Appeals of Stuttgart on April 6, 1955.

395. On appeal to the Federal Supreme Court the decision was reversed and remanded to the Court of Appeals on January 28, 1958, for purposes of further findings and conclusions.

396. On October 29, 1958, the Court of Appeals again dismissed the appeal of the Council of the District of Gera from the judgment of the District Court of Stuttgart of July 31, 1954.

397. The judgment of the Court of Appeals of October 29, 1958, was affirmed by the Federal Supreme Court on November 15, 1960.

398. The Council of the District of Gera, through its attorneys, participated in all of the foregoing proceedings in the various West German courts.

399. In May 1954 the Zeiss firm in Heidenheim, represented by Professor Bauersfeld as Mandatory, commenced an action in the District Court in Duesseldorf against de-

fendants VEB and DIA for an injunction to prevent the two defendants from using the firm name "Carl Zeiss" or any similar name or the Zeiss trademarks in connection with the sale or promotion of products anywhere in the world.

400. The District Court granted judgment for plaintiffs enjoining defendants VEB and DIA from using the firm name "VEB Carl Zeiss Jena" in West Germany and West Berlin unless the words "VEB" and "Jena" were emphasized in such a way that the name Carl Zeiss became less conspicuous. It also enjoined them from using all of the trademarks except those newly registered after 1945, which are not involved here.

401. Both parties appealed and on January 13, 1956, the Court of Appeals entered a judgment expanding the injunction granted to the Zeiss firm to prevent defendant VEB from using not only the firm name VEB Carl Zeiss Jena but any other name containing the words "Zeiss" or "Carl Zeiss".

402. An appeal from the judgment of the Court of Appeals was dismissed, and the judgment was affirmed by the Federal Supreme Court on July 24, 1957. In its decision the Supreme Court determined that the Zeiss firm in Heidenheim was identical with the Zeiss firm formerly domiciled in Jena and that Messrs. Bauersfeld, Henrichs and Kueppenbender had never resigned as members of its Board of Management and were therefore alone authorized to represent the Foundation as proprietor of the firm.

403. Defendant VEB received notice of the institution of said action and participated in all of the court proceedings relating thereto through its attorneys.

Findings of Fact

404. Since February 1954 there has also been litigation with respect to the rights of the parties to the action in the Zeiss name and trademarks in various other countries throughout the world.

405. Since the establishment of the Federal Republic of Germany (West Germany) in 1949 the United States Government has recognized the Government of the Federal Republic.

406. On April 6, 1954, two days before the execution of the purported license from the Foundation to defendant VEB, at the request of the Government of East Germany, the East German Supreme Court rendered an advisory opinion to the government in which it stated that the Carl Zeiss Foundation continued to exist in Jena with the Council of the District of Gera as its Special Board; that the Zeiss and Schott Boards of Management had resigned prior to their departure from Jena; and that the decree of the Wuerttemberg Government of February 23, 1949, creating a new domicile of the Carl Zeiss Foundation in Heidenheim, was invalid. There is no evidence that any member of the Zeiss Board of Management in Heidenheim ever received notice of this opinion or that it was even communicated to them or published.

407. The East German Supreme Court's advisory opinion made no reference to any license agreement (see Finding No. 388) nor did it state that the Foundation had continued to own the Zeiss trademarks after the expropriation.

408. In December 1958 the Council of the District of Gera and defendant VEB brought an action in the District

Court of Leipzig in East Germany against the Zeiss firm in Heidenheim.

409. Notice of commencement of the action was sent to the Zeiss firm in Heidenheim but acceptance of the notice was refused and the envelope in which it was received was returned to the District Court in Leipzig unopened in February 1959 with a cover letter denying jurisdiction of the East German courts on the grounds that they were not legally constituted, and the Zeiss firm did not appear in the action or participate in any way.

410. In September 1959 a default judgment was entered by the District Court of Leipzig enjoining the Zeiss firm from using the trade name "Carl Zeiss" and the various Zeiss trademarks on goods sold in East Germany.

411. The District Court refused, however, to enjoin the use of the name "Carl Zeiss" in communications by the Zeiss firm addressed to public authorities in East Germany, and the Council and defendant VEB appealed.

412. There is no evidence that notice of the appeal was ever sent to the Zeiss firm in Heidenheim or that the Zeiss firm participated in any of the appellate proceedings.

413. In March 1961 the Supreme Court of East Germany affirmed the judgment of the District Court of Leipzig, modifying it to expand the injunction to include use of the firm name on all communications to East German public authorities.

414. The United States Government has never recognized the government of the German Democratic Republic

("DDR") as legitimately constituted and has refused to recognize the existence of an independent state in the Soviet Zone, but has treated the DDR as physically under the control of the Soviet Union although part of a single German state.

415. Since the creation of a new domicile in Heidenheim in 1949 the Carl Zeiss Foundation has continued to function in the spirit and tradition of the Abbe Statute, carrying out the purposes set forth in the Statute.

416. Since 1959 the Ministry of Education of Baden-Wuerttenmberg has been exercising the functions of the Special Board, which were transferred to it by the Zeiss and Schott Boards of Management in accordance with Section 114 of the Statute, subject to the agreement that if Germany is ever re-unified these functions would revert to the Boards of Management until such time as a new Special Board is once again created.

417. Since July 1959 Dr. Karl Bernard has been functioning as the Foundation Deputy.

418. The Zeiss and Schott firms have been and are operating profitably within the framework of the Abbe Statute and their profits have been and are being used in accordance with the purposes set forth in Section 1 of the Statute.

419. The Zeiss firm and Zeiss affiliated enterprises of the Foundation together employ more than 22,000 people and the Foundation ranks as one of the largest industrial enterprises in West Germany.

Findings of Fact

420. Thus, in every way, since 1949 and at present the intentions of Professor Abbe have been and are being carried out in the free part of Germany by Dr. Kueppenbender and his colleagues on the Zeiss Board of Management and by the other statutory organs of the Foundation.

421. The trademark "Zeiss" is the oldest of the trademarks used by the Zeiss firm, having first been adopted in 1846. It was first registered in the United States in the name of the firm of Carl Zeiss on February 12, 1912.

422. The trademark "Carl Zeiss Jena" in the distinctive lens frame was first adopted by the Zeiss firm in 1903 and was first registered in the United States in the name of the firm of Carl Zeiss on April 30, 1907.

423. The trademark consisting of the distinctive lens frame alone was first adopted by the Zeiss firm in 1902 and was first registered in the United States in the name of the firm of Carl Zeiss on June 23, 1914.

424. The trademark "CZ" was first adopted by the Zeiss firm in 1912 and was first registered in the United States in the name of the firm of Carl Zeiss on September 23, 1913.

425. On April 4, 1919, the United States Government purported to vest these various trademarks in the Alien Property Custodian.

426. Despite this vesting, the Carl Zeiss firm continued to use these trademarks in United States commerce until at least 1941.

427. The trademark "Zeiss Ikon" was first registered in the United States in the name of Zeiss Ikon AG on Septem-

ber 17, 1929. Additional registrations were issued on September 24, 1929 and April 15, 1930. On or about February 20, 1950, the United States Government purported to vest the "Zeiss Ikon" trademarks in the Attorney General.

428. Prior to 1925 goods manufactured by the Zeiss firm were sold in the United States through various independent distributors.

429. In 1925 or 1926 Carl Zeiss, Inc. was organized as a New York corporation and its stock was issued to the Carl Zeiss Foundation. Thereafter, until the end of 1941, goods manufactured by the Zeiss firm and Zeiss Ikon AG were primarily sold in the United States through Carl Zeiss, Inc.

430. On August 28, 1942, the United States Government vested all of the capital stock of Carl Zeiss, Inc. in the Alien Property Custodian. The stock remained so vested until December 30, 1960.

431. In 1947 Zeiss Ikon AG resumed the sale of its products in the United States. Until October 1965 such products were sold through Carl Zeiss, Inc. Since October 1965 they have been sold through Zeiss Ikon Voigtlaender of America, Inc., a subsidiary of Carl Zeiss, Inc.

432. Since World War II goods sold in the United States bearing the trademark "Zeiss Ikon" have emanated exclusively from Zeiss Ikon AG of Stuttgart.

433. After the expropriation of its assets in Jena in 1948 the Zeiss firm did not resume manufacturing optical instruments and related products until 1953. However, from 1949 until September 1953 optical instruments produced by Zeiss

Opton at Oberkochen and elsewhere were sold in the United States by Carl Zeiss, Inc.

434. Such goods bore, among others, trademarks consisting of the words "Zeiss Opton" in a distinctive lens frame identical with the one previously used by the Zeiss firm and by Zeiss Ikon AG, the distinctive lens frame alone, and the letters "Z" and "O" superimposed on each other.

435. Since 1953, when it resumed production in West Germany, the Zeiss firm in Heidenheim has sold in the United States primarily through Carl Zeiss, Inc., goods bearing, among others, trademarks consisting of the words "Zeiss", "Carl Zeiss" in the distinctive lens frame, the distinctive lens frame alone and (since 1956) the letters "C" and "Z" superimposed on each other.

436. In 1949 defendant VEB commenced to sell goods bearing the Zeiss trademarks in the United States through Carl Zeiss, Inc., which was then owned and controlled by the Attorney General. Some time in 1950 it ceased to sell such goods to Carl Zeiss, Inc. and commenced to sell them through defendants Steelmasters and Ercona.

437. During the period 1950 to 1961 defendants VEB sold products in the United States bearing one or more of the Zeiss trademarks through defendants Steelmasters and Ercona.

438. In 1948 and 1949 there was but a minimal volume of Zeiss trademarked goods imported into the United States from the Jena Works; approximately $13,000 (ex-factory) in the period 1948-1949; $45,000 in 1949-1950; approximately $160,000 (ex-factory) in 1950; $290,000 in

1951; $76,000 in 1952; $92,000 in 1953; $67,000 in 1954; $108,000 in 1955; $149,000 in 1956; $89,000 in 1957; $79,000 in 1958; $135,000 in 1959; $143,000 in 1960; and $129,000 in 1961. Defendants also engaged in some advertising of the Jena-produced Zeiss-marked goods in American trade, scientific and popular journals.

439. Since 1961 defendant VEB has been selling in the United States products bearing one or more of the Zeiss trademarks principally through defendant Ercona.

440. Since October 1961 defendant VEB has sold binoculars bearing the trademarks "Carl Zeiss Jena" and "Carl Zeiss Jena" in a distinctive lens frame to Trans-Atlantic Allied Corp., 565 Fifth Avenue, New York, New York, pursuant to a written agreement dated October 20, 1961.

441. From October 1964 until some time in 1966 defendant VEB sold geodetic and photogrammetric products bearing the trademarks "Carl Zeiss Jena" and "Carl Zeiss Jena" in a distinctive lens frame to William H. Cook, 3333 N. Street, N.W., Washington, D.C., pursuant to a written agreement entered into on or about October 29, 1964.

442. Both goods made by plaintiffs in West Germany bearing Zeiss trademarks and those made in Jena bearing Zeiss trademarks have generally conformed to the standards for Zeiss quality products.

443. Between 1950 and 1953 or 1954 the importation of goods manufactured by defendant VEB was consented to from time to time by the Attorney General as the registered owner of the Zeiss trademarks or by the vested Carl Zeiss, Inc. as his agent.

Findings of Fact

444. Beginning some time in 1953 or 1954 the Attorney General refused to consent to the further importation of such goods into the United States.

445. On April 4, 1956, an action was commenced in the United States District Court for the District of Columbia by defendants Steelmasters and Ercona against the Attorney General, the Secretary of the Treasury and the Commissioner of Customs.

446. In the action Steelmasters and Ercona sought to enjoin the United States Government from preventing the importation by them of goods manufactured by defendant VEB and bearing the trademark "Zeiss" on the ground that the mark had not been validly vested by the United States Government in 1919 because there was no business in the United States to which the mark was appurtenant.

447. Although the Zeiss firm in Heidenheim assisted the Attorney General by furnishing him with copies of certain pleadings and decisions from court actions pending in West Germany and other documents, it was not a party to the District of Columbia action and did not participate in any way in the conduct of the litigation.

448. On December 8, 1958, a judgment was entered in favor of Ercona and Steelmasters directing the Commissioner of Patents to rectify the trademark registed by deleting all reference to the Attorney General or to the Chemical Foundation as the owner or registrant of the trademark "Zeiss".

449. The Government was also enjoined from interfering with the importation by Ercona and Steelmasters of any goods manufactured by defendant VEB bearing the trademark "Zeiss".

Findings of Fact

450. The District Court expressly stated that "the respective rights, if any, in the 'Zeiss' trademark of the several Carl Zeiss firms now located in East Germany and in West Germany are not in issue in this case; and the Court expresses no opinion with respect thereto. Nor are the decisions rendered by foreign courts with respect to such rights relevant here," and in his brief on appeal to the United States Court of Appeals for the District of Columbia Mr. Rand, representing defendants Steelmasters and Ercona, argued that the respective claims of Heidenheim and Jena to the United States trademarks had no relevance to the case.

451. On March 17, 1960, the judgment of the District Court was affirmed by the United States Court of Appeals for the District of Columbia. In affirming the judgment the Court of Appeals noted that the respective claims of Heidenheim and Jena were not in issue.

452. The stock of Carl Zeiss, Inc. remained under the control and ownership of the United States Government from August 1942 until December 30, 1960, when the Government sold the stock to the Zeiss firm in Heidenheim. Defendant Ercona had unsuccessfully sought to purchase the vested stock.

453. In authorizing the sale of the stock of Carl Zeiss, Inc. to the plaintiff Zeiss firm in Heidenheim, the Attorney General, acting on behalf of the President of the United States, stated the view of the United States Government that, consistent with the foreign policy interests of the United States and in order that the American consumer not be confused or misled, only the Carl Zeiss Foundation in West Germany should be recognized as the legitimate Carl Zeiss Foundation and its operating firms as the producers of genuine Zeiss products.

Findings of Fact

454. On or about June 9, 1961, the purported Carl Zeiss Stiftung in Jena and defendant VEB purported to assign certain trademarks, including the trademarks "Zeiss", "Carl Zeiss Jena" in a distinctive lens frame and "CZ" to defendant Ercona pursuant to a written instrument of assignment.

455. Despite a request by defendant Ercona to the Attorney General of the United States in 1961, none of the defendants has, at any time, ever obtained any authorization from the Attorney General to transfer or assign any trademarks, or rights or interests therein or relating thereto, to any person or firm in the United States, nor has any of them obtained any authorization from the Attorney General to exercise any right, power or privilege with respect to any such trademark or rights or interests therein or relating thereto.

456. Commencing in 1953, plaintiff Carl Zeiss firm of Heidenheim and plaintiff Zeiss Ikon AG filed applications for registration of trademarks with the United States Patent Office as follows:

Mark	*Applicant*	*Serial No.*	*Date*
The words "Carl Zeiss" in a distinctive lens frame	Plaintiff Carl Zeiss	657,816	December 10, 1953
"Zeiss"	Plaintiff Carl Zeiss	36,037	August 21, 1957
"Zeiss"	Plaintiff Carl Zeiss	36,035	August 22, 1957
"Zeiss Ikon"	Plaintiff Zeiss Ikon	49,329	April 8, 1958

Findings of Fact

457. Oppositions to these applications for registration were filed in the United States Patent Office by defendant Ercona, but no such opposition was filed by either the so-called Carl Zeiss Stiftung in Jena or defendant VEB.

458. There is no evidence that either the purported Carl Zeiss Stiftung in Jena or defendant VEB has ever applied for registration in the United States of any of the trademarks involved in this suit or taken any other steps in the United States to protect their alleged respective rights in such marks.

459. On October 17, 1961, a registration of the trademark "Zeiss" was issued by the United States Patent Office to the plaintiff Carl Zeiss firm of Heidenheim for use on electric generators and related equipment.

460. On February 13, 1962, a registration of the trademark "Zeiss Ikon" was issued by the United States Patent Office to plaintiff Zeiss Ikon AG of Stuttgart for use on photographic equipment.

461. A petition for cancellation of the registrations set forth in Findings Nos. 459 and 460 was filed in the United States Patent Office by defendant Ercona, but no such petition was ever filed by the purported Carl Zeiss Stiftung in Jena or by defendant VEB.

462. In 1962 and 1963, pursuant to legislation adopted by the United States Congress, all of the Zeiss Ikon trademarks involved in this litigation, which had previously been vested by the United States Government, were returned to Zeiss Ikon AG of Stuttgart.

Findings of Fact

463. Since the post-war resumption of its sales in the United States, goods manufactured by Zeiss Ikon AG in West Germany have been actively promoted and sold by Carl Zeiss, Inc. (and since 1965 by Zeiss Ikon-Voigtlaender of America) throughout the United States.

464. The total volume of such sales since the war has been $41,445,032 for the period through 1966, and in fiscal 1966 the dollar volume of such sales was $1,678,515.

465. In advertising and promoting goods manufactured by plaintiff Zeiss Ikon, Carl Zeiss, Inc. and Zeiss Ikon-Voigtlaender of America consistently indicated that such goods originate in West Germany.

466. The volume of Zeiss Opton products sold in the United States during the period 1949-1953 was approximately $654,021.

467. In connection with its promotion and advertising of Zeiss Opton's products, Carl Zeiss, Inc. consistently indicated that such products emanated from West Germany.

468. During the period October 1, 1953, until September 30, 1966, sales of products of the Zeiss firm of Heidenheim bearing the various Zeiss trademarks referred to in Finding No. 435 by Carl Zeiss, Inc. in the United States totalled $56,803,069, and Carl Zeiss, Inc. expended $5,893,498 in advertising and promoting the names "Carl Zeiss", "Zeiss" and "Zeiss Ikon" and the products manufactured by plaintiffs bearing the various trademarks in issue here.

469. In connection with all such advertising and promotion, Carl Zeiss, Inc. has consistently indicated that prod-

ucts bearing the trademarks "Zeiss", "Carl Zeiss" and "Zeiss Ikon" emanating exclusively from West Germany.

470. The mark "Carl Zeiss" in a distinctive lens frame was not used at all on any significant quantities of goods prior to October 1, 1953; it then first began to be used regularly on Heidenheim-Oberkochen goods.

471. The marks "Carl Zeiss Jena" and the words "Carl Zeiss Jena" in the distinctive lens frame have been used only by the Jena enterprise.

472. In advertising goods manufactured by defendant VEB bearing the trademark "Carl Zeiss Jena" in a lens frame, defendant Ercona has, as a general rule, not identified the geographic origin of the products. On the goods themselves the word "Germany" alone is engraved to designate the origin.

473. The total volume of goods produced by defendant VEB and sold by Ercona in the United States during the 19 years from 1948 to 1966 amounts to $6,709,491, or an average of less than $350,000 a year. Since 1957 the annual volume of such sales has been less than $300,000.

474. From 1950 through 1963 the annual dollar volume of defendant VEB's sales ex-factory to Steelmasters and Ercona has exceeded $150,000 in only one year, 1951, when sales were $290,000, and has been less than $100,000 in seven of the remaining 13 years.

475. Since 1949 the word "Jena" has never appeared in any of the advertising or promotional material emanating from Carl Zeiss, Inc. and relating to goods manufactured

by Zeiss Opton and the Zeiss firm at Oberkochen and elsewhere in West Germany.

476. There is no evidence that the American consuming public associates the word "Jena" with the name "Zeiss" or "Carl Zeiss" or has any expectation that Zeiss goods which they purchase are manufactured exclusively in Jena.

477. Since prior to 1945 goods bearing the trademark "Zeiss Ikon" in a distinctive lens frame have been manufactured exclusively in locations other than Jena.

478. Goods bearing the trademarks "Carl Zeiss", "Zeiss Opton", "Zeiss Aerotopo" and "Zeiss Winkel" in the same distinctive lens frame have been manufactured in Western Germany but not at Jena and have been sold in the United States during various periods since 1949.

479. Confusion and mistake has resulted among members of the consuming public in the United States from the sale of competing products by plaintiffs and defendants bearing substantially identical trademarks.

480. This confusion and mistake has resulted in part from ignorance as to the existence of two independent sources for Zeiss products sold in the United States and in part from ignorance as to whether certain Zeiss products have emanated from plaintiffs or from defendant VEB.

481. The continued sale by defendants of goods in the United States bearing the various "Zeiss" trademarks or any other marks of which the words "Zeiss", "Carl Zeiss", the distinctive lens frame, or the initials "CZ" form a part, and the use of the trade name "VEB Carl Zeiss Jena" or

any other trade name containing the words "Zeiss" or "Carl Zeiss" in connection therewith, will probably result in continued confusion, mistake and deception on the part of members of the public and the trade in the United States.

s/ WALTER R. MANSFIELD
U.S.D.J.

Dated: November 7, 1968.

S-127

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

62 Civ 850

(#35694—Filed March 12, 1969—4:40 P.M.)

CARL ZEISS STIFTUNG, doing business under the name and style of CARL ZEISS; and ZEISS IKON A.G.,

Plaintiffs,

—against—

V.E.B. CARL ZEISS, JENA; STEELMASTERS, INC.; ERCONA CORPORATION; EXAKTA CAMERA COMPANY, INC.; and CAMERA SPECIALTY COMPANY, INC.,

Defendants,

CARL ZEISS, INC.,

Additional Defendant on Counterclaims.

Findings of Fact with Respect to Antitrust Misuse Defense

APPEARANCES

(Omitted)

MANSFIELD, D.J.

1. The various "Zeiss" and "Zeiss Ikon" trademarks are world-renowned and valuable, and identify various scientific instruments and optical goods as manufactured by plaintiffs according to their traditional high quality standards.

Findings of Fact with Respect to Antitrust Misuse Defense

2. Neither plaintiffs nor Carl Zeiss, Inc. (Zeiss, N.Y.) nor Zeiss Ikon Voigtlaender of America, Inc. (ZIV, Inc.) used or are using the "Zeiss" or "Zeiss Ikon" trademarks to violate the antitrust laws in the United States.

3. There is no evidence of any agreement or any communication or discussion between Zeiss, N.Y. or ZIV, Inc. and any of their respective dealers relating in any way to the use of any of the "Zeiss" or "Zeiss Ikon" trademarks. The evidence is that references in such communications and discussions to "Zeiss" instruments and "Zeiss Ikon" products were to products manufactured by plaintiffs and not to any of the "Zeiss" or "Zeiss Ikon" trademarks.

4. While the "Zeiss" and "Zeiss Ikon" trademarks are world-renowned and valuable trademarks, there is a failure to establish by a fair preponderance of the evidence that they were used by either of the plaintiffs, or by Zeiss, N.Y. or ZIV, Inc., as a means of coercing American dealers to engage in any anti-competitive activities.

5. Dealers have accepted dealerships from Zeiss, N.Y. and ZIV, Inc. because they wish to have the opportunity to sell products manufactured by plaintiffs.

6. The sales of defendant Ercona for the year 1956 were approximately $149,000, in 1955 Ercona was permitted to use the trademarks, and sales were approximately $108,000. After 1956 the figures were $89,000 in 1957; $79,000 in 1958; $135,000 in 1959; $143,000 in 1960; $129,000 in 1961. In the years prior to 1956 there were considerable fluctuations in the volume of sales by Ercona.

Findings of Fact with Respect to Antitrust Misuse Defense

7. During the period from approximately 1956 to 1959 defendants sold goods in the United States manufactured by V.E.B. Carl Zeiss Jena from which the Zeiss trademarks had been obliterated and on which only the symbol "CZJ" appeared. Prior to 1956 and after 1959 instruments bearing the Zeiss trademarks were sold by Ercona in the United States. A comparison of Ercona's volume of sales of such instruments for the entire period fails to show any causal connection between the Zeiss trademarks and Ercona's sales volume. The annual sales volume fluctuated up and down from year to year, revealing that two of the years (1956, 1959) in which the marks were obliterated produced a greater annual volume than five of the years (1952-1955 and 1961) in which the marks were on the instruments.

8. Neither Zeiss, N.Y. nor ZIV, Inc. has offered to sell unmarked instruments to dealers who refuse to enter into a dealership agreement, or offered to sell instruments bearing the Zeiss trademarks on one basis and untrademarked goods on another.

9. After appraising the testimony of two dealers (Rosenberg and Watson) with respect to the significance of Zeiss trademarks in the sale of Zeiss-manufactured instruments, and appraising their demeanor, the Court finds itself unable to extend any weight to their testimony as probative on the issue of alleged antitrust misuse of the Zeiss trademarks. Rosenberg, the operator of a small curiosity shop dealing almost entirely (98%) in used merchandise consisting principally of art, paintings and bric-a-brac, never has been a Zeiss dealer and his testimony with respect to Zeiss trademarks is rejected as weightless and unconvinc-

ing. Watson, a dealer in Zeiss-manufactured instruments, testified that he regarded himself as a poor witness with respect to what the Zeiss trademarks meant to others; that while he would not purchase Zeiss instruments without trademarks on them he had never been offered such instruments; and that he would be willing to sell instruments bearing the legend or label "Manufactured by Carl Zeiss Germany" without a Zeiss trademark. At no time did any representative of plaintiffs or Zeiss, N.Y. or ZIV, Inc. ever discuss the Zeiss trademarks with him.

10. Federal government agencies on occasion have made invitations to bid specifying "Zeiss" instruments "or equivalent" and describing the instruments sought. There is no evidence that such specifications could be filled solely by instruments bearing any of the Zeiss trademarks which are the subject of this action.

11. Neither of the plaintiffs was ever a party to any agreement with defendant V.E.B. or anyone else whereby the Zeiss or Zeiss Ikon trademarks in the United States would be licensed as part of any cartel dividing the world market for Zeiss products. Although, as the Court has already found (see Findings Nos. 375-383) the Jena and Heidenheim gentlemen communicated in 1951 with respect to a possible licensing agreement and the Jena gentlemen during 1952 until sometime in 1953 tacitly indicated the possibility of reaching such a license agreement, no such arrangement was ever consummated. (Finding No. 383 and Decision of Nov. 7, 1968, p. 144) In any event, as the Court has already found (see Decision pp. 136-137), §5(b) of the Trading with the Enemy Act would have rendered any such license ineffective.

Findings of Fact with Respect to Antitrust Misuse Defense

12. Plaintiff Carl Zeiss Stiftung owns 100% of the shares of Zeiss, N.Y., a New York corporation. None of the current officers of Zeiss, N.Y. is presently an officer or employee of plaintiff Carl Zeiss Stiftung. Of the five directors of Zeiss, N.Y., one, Dr. Kuehn, Chairman of the Board, is a member of the Board of Management of the plaintiff Carl Zeiss Stiftung and general manager in charge of sales for that enterprise. Another director, Dr. Lehmann, is in charge of sales of scientific instruments for plaintiff Carl Zeiss Stiftung. Another director and the president of Zeiss, N.Y., Mr. Kessler, was employed by plaintiff Carl Zeiss Stiftung from 1953 until 1962 when he came to New York. Dr. Skoludek, a director and executive vice-president of Zeiss, N.Y., was in charge of sales at Carl Zeiss Cologne before assuming his duties in New York in 1965.

13. Zeiss, N.Y. is the sole authorized importer and distributor in the United States of all scientific instruments manufactured and sold for export to the United States by the plaintiff Carl Zeiss Stiftung, except for geodetic instruments and spectacle lenses bearing the Zeiss trademarks which are distributed in the United States by Keuffel & Esser and Transcontinental Corp., respectively, American companies in which neither Zeiss, N.Y. nor plaintiff Carl Zeiss Stiftung has any interest. It purchases goods for its own account from plaintiff Carl Zeiss Stiftung at the same prices at which said plaintiff offers such goods for sale to its other distributors in Germany and elsewhere, including distributors who are not affiliated with said plaintiff, and resells such goods to dealers and other purchasers in the United States.

Findings of Fact with Respect to Antitrust Misuse Defense

14. Zeiss, N.Y. distributes goods other than those manufactured by plaintiff Carl Zeiss Stiftung, including spectrophotometers manufactured by RSV, a German firm, bearing the trademark "RSV", and in the past has also sold goods manufactured by other firms bearing trademarks other than the "Zeiss" trademarks.

15. Plaintiff Carl Zeiss Stiftung acquired a majority of the shares of Voigtlaender A.G., a German camera manufacturer, in 1956. Thus both Voigtlaender A.G. and plaintiff Zeiss Ikon A.G. were subsidiaries of plaintiff Carl Zeiss Stiftung in October 1965, when Zeiss Ikon Voightlaender Vertriebsgesellschaft, M.b.H., was organized in Germany for the joint marketing of Zeiss Ikon and Voigtlaender photographic equipment, and when Zeiss Ikon Voigtlaender of America, Inc. was organized to engage in such marketing in the United States.

16. ZIV, Inc. is a New York corporation, the stock of which is owned as follows: 80% by Zeiss, N.Y., 10% by plaintiff Zeiss Ikon A.G., and 10% by Voigtlaender A.G. None of the officers or directors of ZIV, Inc. is an officer or director of either of the plaintiffs, except that Dr. Goessler, a member of the board of directors of ZIV, Inc., is an officer of plaintiff Zeiss Ikon, and another member, Mr. Kessler, is the president of Zeiss, N.Y. The president of ZIV, Inc., who is also a director, Mr. Peerschke, was an officer of Zeiss, N.Y. before he became president of ZIV, Inc. Mr. Breford, the vice-president of ZIV, Inc., was likewise a Zeiss, N.Y. officer before he assumed the vice-presidency of ZIV, Inc.

Findings of Fact with Respect to Antitrust Misuse Defense

17. ZIV, Inc. purchases cameras and other photographic equipment from Zeiss Ikon Voigtlaender of Germany for its own account and resells such products to its dealers in the United States.

18. Both Zeiss, N.Y. and ZIV, Inc., respectively, themselves:

(a) pay the salaries of all their employees;

(b) keep their own separate books and records at their offices in New York;

(c) prepare their own financial statements and tax returns separate and apart from those of plaintiffs;

(d) pay their own operating expenses;

(e) have their own pension plans and health insurance plans for the benefit of their employees, underwritten by an American insurance company; and

(f) have their own bank accounts with banks in the City of New York and from time to time obtain loans from such banks for the financing of their businesses.

19. Neither Zeiss, N.Y. nor ZIV, Inc.:

(a) has received any loans from either of the plaintiffs; or

(b) has consulted with either of the plaintiffs or with Zeiss Ikon Voigtlaender of Germany prior to appointing dealers, terminating dealers, establishing prices, determining discounts or bidding on public contracts in the United States.

Findings of Fact with Respect to Antitrust Misuse Defense

20. Neither of the plaintiffs has any office in the United States.

21. Dr. Kuehn, who is Chairman of the Board of Directors of Zeiss, N.Y. and a member of the Board of Management of plaintiff Carl Zeiss Stiftung, maintains no office in the United States and visits the United States approximately once a year.

22. Dr. Kuehn, as Chairman of the Board of Directors of Zeiss, N.Y. and a representative of its sole shareholder, Carl Zeiss Stiftung, has from time to time set general policies for the management of Zeiss, N.Y., but has not exercised direction or control over its competitive practices, sales prices, or distribution activities.

23. Zeiss, N.Y. has made some reports to plaintiff Carl Zeiss Stiftung with respect to the market conditions in the United States for Zeiss instruments. Each month Zeiss, N.Y. sends financial statements to the Carl Zeiss Stiftung, and Zeiss, N.Y. has made annual reports to plaintiff Carl Zeiss Stiftung which contained information about competitors' instruments and the United States market. Zeiss, N.Y. also sends copies of its price lists to plaintiff Carl Zeiss Stiftung.

24. The president of Zeiss, N.Y. visits Oberkochen approximately twice a year and there discusses with plaintiff Carl Zeiss Stiftung's employees the general market situation in the United States. Other officers and key employees of Zeiss, N.Y. also travel to Germany and representatives of plaintiff Carl Zeiss Stiftung likewise periodically visit Zeiss, N.Y.

Findings of Fact with Respect to Antitrust Misuse Defense

25. ZIV, Inc. furnishes statements of its financial condition to Zeiss Ikon A.G. and Voigtlaender A.G. monthly at the plant. These monthly reports contain information about conditions in the United States market, including the competition and the prices of competing goods.

26. There were, during 1965, discussions between representatives of ZIV, Inc. and a Mr. Ellenbogen of Wall Street Camera with respect to the advertisement of Zeiss Ikon cameras by Wall Street Camera at a price below the retail price suggested by ZIV, Inc. No specific reference to the Zeiss trademarks were made during these discussions, but Mr. Ellenbogen was advised that it was thought that his advertising impaired the good will of Zeiss Ikon cameras. Although Wall Street Camera has upon occasion since 1965 advertised Zeiss Ikon cameras at less than the suggested retail prices, it has continued to be supplied with its requirements of Zeiss Ikon cameras by ZIV, Inc. ZIV, Inc. instituted a fair trade policy in New York in May 1965.

27. ZIV, Inc. has reported to Zeiss Ikon A.G. that Zeiss Ikon trademarked cameras have been imported into the United States by unauthorized importers and sold here by dealers at prices below the suggested resale prices published by ZIV, Inc.; and ZIV, Inc. has requested Zeiss Ikon A.G.'s aid in cutting off German distributors who sell to such unauthorized importers.

/s/ WALTER R. MANSFIELD
U.S.D.J.

Dated: March 12, 1969.